1368

No. 1150 1366

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JAMES C. DAVIS, Agent, United States Railroad Administration (Southern Pacific, Company),

Plaintiff in Error,

vs.

A. J. PARRINGTON,

Defendant in Error.

TRANSCRIPT OF RECORD

On Writ of Error to the United States District Court for the District of Oregon.

NAMES AND ADDRESSES OF COUNSEL

WILSON & GUTHRIE,
Platt Building, Portland, Ore.,

Attorneys for Defendant in Error.

JOHN F. FINERTY,
Assistant General Counsel, United States Railroad Administration, Washington, D. C.

A. M. BULL,
United States Railroad Administration, Washington, D. C.

PAUL P. FARRENS,
Yeon Building, Portland, Ore.,

Attorneys for Plaintiff in Error.

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(In conformity with stipulation of counsel printed at page 188 of this Transcript, the caption, titles, clerk's endorsements, and other formal matters appearing in the original papers, not material to this hearing, are omitted therefrom.)

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vs.

A. J. PARRINGTON,

Defendant in Error.

TRANSCRIPT OF RECORD

On Writ of Error to the United States District Court for the District of Oregon.

On the 30th day of October, 1923, there was duly filed in the District Court of the United States for the District of Oregon the following

CITATION ON WRIT OF ERROR

United States of America,
District of Oregon—ss.
To A. J. Parrington, Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Oregon, wherein James C. Davis, Director General of Railroads, as agent United States Railroad Administration (Southern Pacific Company) is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this 30th day of October, in the year of our Lord, one Thousand, nine hundred and twenty-three.

R. S. BEAN,
Judge.

Due and legal service of the within citation is hereby admitted and accepted at Portland, Oregon, this 30th day of October, 1923.

JAMES G. WILSON,
Attorney for Defendant in Error.

On October 30th, 1923, there was issued the following Writ of Error:

In the United States Circuit Court of Appeals for the Ninth Circuit.

JAMES C. DAVIS, Director General, as Agent United States Railroad Administration (Southern Pacific Company)
Plaintiff in Error,

vs.

Writ of Error.
No. L-8845

A. J. PARRINGTON,
Defendant in Error.

The United States of America—ss.

The President of the United States of America.
To the Judge of the District Court of the United States for the District of Oregon: Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before the Honorable Robert S. Bean, one of you, between A. J. Parrington, Plaintiff and Defendant in Error, and James C. Davis, Director General, as Agent United States Railroad Administration (Southern Pacific Company), Defendant and Plaintiff in Error, a manifest error hath happened to the great damage of the said Plaintiff in Error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with

this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, this 30th day of October, 1923.

G. H. MARSH,
Clerk of the District Court of the United States for the District of Oregon.

By F. L. BUCK, Chief Deputy.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON,

July Term, 1921.

BE IT REMEMBERED, That on the 16th day of September, 1921, there was duly filed in the District Court of the United States for the District of Oregon, a complaint at law in words and figures as follows, to-wit:

AT LAW COMPLAINT

Comes now the plaintiff and for cause of action against defendant alleges:

I.

That the defendant is the duly appointed, qualified and acting agent of the United States Railroad Administration, appointed under Section 206-A of the Transportation Act of Congress of 1920, and has authority to represent said Railroad Administration in defense of this action.

II.

That the Southern Pacific Company is a corporation organized and existing under and by virtue of the laws of the State of Kentucky, and is and was during all the times mentioned in plaintiff's complaint the owner of a line of railroad extending from points in California hereinafter referred to, to Portland in the state of Oregon; that the Oregon, Washington Railroad & Navigation Company is a corporation organized and existing under and by virtue of the laws of the State of Oregon, and is the owner of a line of railroad extending from Portland, among other points, St. Johns, in the state of Oregon.

III.

That San Francisco, Marysville, Hamilton, Crockett, and other points designated in the tariff hereinafter referred to as "Group 1 Points", Alvarado, Salinas, Visalia and Betteravia are points in the state of California, and all of said points with the exception of Betteravia are located on the line of the Southern Pacific

Company; that Betteravia is a point located on the line of the Santa Maria Valley Railway, which connects with the line of the Southern Pacific at Guadalupe; that the stations designated as Portland, East Portland and St. Johns are all in the state of Oregon and within the corporate limits of the City of Portland, Oregon; that the lines of the Southern Pacific Company and the Oregon, Washington, Railroad & Navigation Company reach the stations known as Portland and East Portland within the corporate limits of the City of Portland, and the line of the Oregon, Washington Railroad & Navigation Company extends to and through the station of St. Johns within the corporate limits of the City of Portland, but the said station of St. Johns is not reached or touched by the line of the Southern Pacific Company.

IV.

That from and after 12 o'clock noon of December 28th, 1917, to midnight of February 29th, 1920, which period will hereinafter be designated as the period of federal control, the United States Railroad Administration was in control of the said lines of railroad of the Southern Pacific Company extending from various points in California, including those in the preceding paragraph mentioned, to Portland in the state of Oregon, and was likewise in possession during said period of the line of railroad of the Oregon, Washington Railroad & Navigation Company, including that portion thereof between the stations of Portland and St. Johns

within the corporate limits of Portland, state of Oregon, and was operating said lines of railroad as a common carrier in interstate commerce under the authority of the United States and the Director General of Railroads, and pusuant to the tariffs, rules and regulations for such purpose adopted and provided.

V.

That at Portland, Oregon, the line of railroad of the Southern Pacific Company connects with the line of railroad of the Oregon, Washington Railroad & Navigation Company; that heretofore and prior to the period of federal control the Southern Pacific Company published and filed with the Interstate Commerce Commission Supplement 26 to Pacific Freight Tariff Bureau Joint and Proportional Tariff 1B, Interstate Commerce Commission No. 110, and by item 815-B thereof established a rate on sugar in car load lots of minimum weight of 44,000 lbs. to be applied on transportation of sugar from the points in California above in Paragraph III named to the stations of Portland and East Portland, to be applied on shipments when destined to points on the line of the Oregon, Washington Railroad & Navigation Company beyond Portland and East Portland; that the said proportional rate so established from San Francisco, Crockett, Alvarado, Marysville, Hamilton and other points named in said tariff as Group 1, was 13c per 100 lbs.; from Salinas and Visalia, 20½c per 100 lbs.; and from Betteravia, 23c per 100 lbs.; that it was provided in said

tariff and supplements thereto that rates from said originating points in California to points on the line of the Oregon, Washington Railroad & Navigation Company should be made by adding the said proportional rate so established to the local rate from Portland or East Portland established by the Oregon, Washington Railroad & Navigation Company from Portland or East Portland, including rates to stations on the Oregon, Washington Railroad & Navigation Company line contained in said company's tariff No. 6-B, I. C. C. No. 283, effective March 15th, 1914; that in and by Supplement No. 57 of said Pacific Freight Tariff Bureau Joint and Proportional Freight Tariff 1-B, I. C. C. 110, effective June 25th, 1918, which said supplement was published and filed with the Interstate Commerce Commission, said proportional rate from said points in California to Portland and East Portland, Oregon, was increased so that the rate from and after said 25th day of June, 1918, became 16½c per hundred pounds from San Francisco, Marysville, Hamilton, Crockett, Alvarado, and Group 1 points to Portland and East Portland; 25½c per hundred pounds from Salinas and Visalia to Portland and East Portland; and 29c per hundred pounds from Betteravia to Portland and East Portland; which said rate was continued in effect by said supplement and reissues of said tariff up to and subsequent to the termination of federal control.

VI.

That the Oregon, Washington Railroad & Navigation Company published and filed with the Interstate

Commerce Commission its local tariff No. 6-B, I. C. C. No. 283, effective March 15th, 1914, wherein by Item 70 it established and put into effect a rate, from its stations of Portland and East Portland to its station of St. Johns in the state of Oregon, of 37½c per ton of 2000 lbs. with a minimum charge of $7.50 per car, which said rate applied on sugar in car load lots; that said rate was continued in effect by said tariff and supplements and reissues thereof up to and including the 30th day of December, 1919; that thereafter in and by supplement No. 23 of the Oregon, Washington Railroad & Navigation Company's local freight tariff No. 6-C, I. C. C. 312, Item 60-G, published and filed with the Interstate Commerce Commission and made effective December 31st, 1919, the said Oregon, Washington Railroad & Navigation Company established a rate from its station of Portland to its station of St. Johns of $7.50 per car when received from its connections at Portland, which said rate continued in effect until the termination of federal control.

VII.

That the United States Railroad Administration adopted and continued in effect the rates of the Southern Pacific Company and the Oregon, Washington Railroad & Navigation Company hereinbefore referred to, established before federal control, and joined in and were parties to the changes in said rates established during federal control as hereinbefore referred to.

VIII.

That the station of St. Johns is more distant from

San Francisco, Marysville, Hamilton, Crockett, Alvarado, Visalia, Salinas, and Betteravia over the line of the Southern Pacific Company and the Oregon, Washington Railroad & Navigation Company by the route over which said rates are established as hereinbefore alleged than the station of Portland, and the haul over said route between said points in California to Portland is included within the haul over said route to St. Johns, and is in the same direction and over the same line or route, and the haul to Portland over said route is included within the haul from said points in California to St. Johns.

IX.

That on all shipments over said route from Crockett, Port Costa, a point in Group 1, Alvarado and Salinas, from January 1st, 1918, to and inclusive of June 24th, 1918, the said defendant charged and collected the sum of 23c per 100 lbs. on sugar in car load lots; and from San Francisco to Portland charged and collected the sum of 20c per hundred pounds; from Betteravia and Hamilton, the sum of 25c per 100 lbs.; and from Visalia the sum of 27½c per 100 lbs.; and in addition thereto collected thereon war tax at the rate of 3% of the transportation charge; and on all shipments between and inclusive of June 25th, 1918, and December 30th, 1919, charged and collected thereon from Crockett, Port Costa, Alvarado and Salinas the sum of 29c per 100 lbs.; from San Francisco 25c per 100 lbs.; from Betteravia and Hamilton, 31½c per 100 lbs.; and from Visalia 34½c per 100 lbs.; that from and inclusive of

the 31st day of December, 1919, to the end of federal control said defendant collected and received on shipments of sugar to Portland in car load lots from Crockett, Port Costa, Alvarado and Salinas 29c per 100 lbs.; from San Francisco 25c per 100 lbs.; from Betteravia and Hamilton 31½c per 100 lbs.; and from Visalia 34½c per 100 lbs.

X.

That on all of the shipments hereinafter specified the said United States Railroad Administration exacted and charged as war tax at the rate of 3% of the charges collected; that said charges were to the extent that the same exceeded the rate established and in effect from the various points in California to the station of St. Johns at the same time illegal and unlawful, and charged without the authority of law, and the exaction of a war tax on the excess of such charges over said rates from said respective points in California to St. Johns was illegal and unlawful and exacted without authority of law, and in violation of Section 4 of the act of Congress known as the Act to Regulate Commerce and amendments thereto, and that the only lawful rate in effect from January 1st, 1918, to and inclusive of June 24th, 1918, was as follows: From Crockett, Port Costa, Alvarado, San Francisco and Hamilton 14⅞c per 100 lbs.; from Betteravia 24⅞c per 100 lbs.; and from Visalia and Salinas 22⅜c per 100 lbs.; plus war tax of 3% upon the transportation charge; that the only lawful rate to Portland from June 25th, 1918, to and inclusive

of December 30th, 1919, from the various points in California was as follows: From Crockett, Port Costa, Alvarado, San Francisco and Hamilton, 18⅜c per 100 lbs.; from Betteravia 30⅞c per 100 lbs.; and from Visalia and Salinas 27⅜c per 100 lbs.; plus war tax of 3% upon the transportation charge; that the only lawful rate in effect to Portland from said various points in California between the 31st day of December, 1919, and the end of federal control was as follows: From Crockett, Port Costa, Alvarado, San Francisco and Hamilton 16½c per 100 lbs. plus $7.50 per car; from Betteravia 29c per 100 lbs. plus $7.50 per car; and from Visalia and Salinas 25½c per 100 lbs. plus $7.50 per car; plus war tax of 3% upon the transportation charge.

XI.

That between the 1st day of January, 1918, and the 25th day of June, 1918, there was shipped from Crockett, California, to Portland, Oregon, via the line of the Southern Pacific Company over the route hereinabove specified, consigned to Mason Ehrman & Co. a number of car loads of sugar on the dates and of the weights shown in the exhibit marked "Exhibit A, Mason Ehrman" attached hereto and made a part of this complaint, on all of which defendant received and collected as transportation charges 23c per 100 lbs., together with a war tax of 3% thereon; that between the same dates there was shipped from San Francisco to Portland via the line of the Southern Pacific Company over the

route hereinabove specified, consigned to Mason Ehrman & Co. the number of car loads of sugar on the date and of the weight shown on the exhibit marked "Exhibit B, Mason Ehrman" attached hereto and made a part of this complaint, on all of which defendant received and collected as transportation charges 20c per 100 lbs. together with a war tax of 3% thereon; that between the 25th day of June, 1918, and the 31st day of December, 1919, there was shipped from Crockett, California, to Portland, Oregon, via the line of the Southern Pacific Company over the route hereinabove specified, consigned to Mason Ehrman & Co. a number of car loads of sugar on the dates and of the weights shown in the exhibit marked "Exhibit C, Mason Ehrman" attached hereto and made a part of this complaint, on all of which defendant received and collected as transportation charges 29c per 100 lbs., together with a war tax of 3% thereon; that between the same dates there was shipped from San Francisco to Portland via the line of the Southern Pacific Company over the route hereinabove specified, consigned to Mason Ehrman & Co. the number of car loads of sugar on the date and of the weight shown on the exhibit marked "Exhibit D, Mason Ehrman" attached hereto and made a part of this complaint, on all of which defendant received and collected as transportation charges 25c per 100 lbs. together with a war tax of 3% thereon; that between the same dates there was shipped from Betteravia to Portland via the line of the Southern Pacific Company over the route hereinabove specified, con-

signed to Mason Ehrman & Company the number of car loads of sugar on the date and of the weight shown on the exhibit market "Exhibit E, Mason Ehrman" attached hereto and made a part of this complaint, on all of which defendant received and collected as transportation charges 31½c per 100 lbs. together with a war tax of 3% thereon; and that between December 31st, 1919, and February 29th, 1920, there was shipped from Crockett, California, to Portland, Oregon, via the line of the Southern Pacific Company over the route hereinabove specified, consigned to Mason, Ehrman & Co. a number of car loads of sugar on the dates and of the weights shown in the exhibit marked "Exhibit F, Mason, Ehrman" attached hereto and made a part of this complaint, on all of which defendant received and collected as transportation charges 29c per 100 lbs. together with a war tax of 3% thereon.

XII.

That between the 25th day of June, 1918, and the 30th day of December, 1919, there was shipped from Crockett, California, to Portland, Oregon, via the line of the Southern Pacific Company over the route hereinabove specified, consigned to Wadhams & Company a car load of sugar on the date and of the weight shown in the exhibit marked "Exhibit G, Wadhams & Co." attached hereto and made a part of this complaint, on which defendant received and collected as transportation charges 29c per 100 lbs., together with a war tax

of 3% thereon; and that between the same dates there was shipped from San Francisco to Portland via the line of the Southern Pacific Company over the route hereinabove specified, consigned to Wadhams & Company a car load of sugar on the date and of the weight shown in the exhibit marked "Exhibit H, Wadhams & Co." attached hereto and made a part of this complaint, on which defendant received and collected as transportation charges 25c per 100 lbs. together with a war tax of 3% thereon.

XIII.

That between the 25th day of June, 1918, and the 30th day of December, 1919, there was shipped from San Francisco to Portland via the line of the Southern Pacific Company over the route hereinabove specified, consigned to Lang & Company, a car load of sugar on the date and of the weight shown in the exhibit marked "Exhibit I, Lang & Co." attached hereto and made a part of this complaint, on which defendant received and collected as transportation charges 25c per 100 lbs. together with a war tax of 3% thereon.

XIV.

That between the 25th day of June, 1918, and the 30th day of December, 1919, there was shipped from Crockett, California, to Portland, Oregon, via the line of the Southern Pacific Company over the route hereinabove specified, consigned to Wadhams & Kerr Bros.

a number of car loads of sugar on the dates and of the weights shown in the exhibit marked "Exhibit J Wadhams & Kerr" attached hereto and made a part of this complaint, on all of which defendant received and collected as transportation charges 29c per 100 lbs., together with a war tax of 3% thereon; and that between the same dates there was shipped from San Francisco to Portland via the line of the Southern Pacific Company over the route hereinabove specified, consigned to Wadhams & Kerr Bros. the number of car loads of sugar on the date and of the weight shown on the exhibit marked "Exhibit K, Wadhams & Kerr" attached hereto and made a part of this complaint, on all of which defendant received and collected as transportation charges 25c per 100 lbs. together with a war tax of 3% thereon.

XV.

That all of said charges were paid by the respective consignees on the exhibits attached, on the respective dates shown in the column marked "Date Paid"; that the over charges on each of said shipments are designated in the column marked "Overcharges"; that all of said charges were illegally exacted, and exacted contrary to the provisions of Section 4 of the act of Congress known as The Act to Regulate Commerce and amendments thereto, and the plaintiff's assignors were compelled to and did pay the same in order to secure delivery and possession of said shipments; that all of said charges above enumerated on the shipments listed

were paid by Mason Ehrman & Company, Wadhams & Company, Lang & Company and Wadhams & Kerr Bros. and that said firms have heretofore and for a valuable consideration sold, assigned and transferred to the plaintiff all of their right, title and interest in and to said overcharge and excess war tax and claim against the defendant on all shipments shipped between the dates above specified; and that the defendant is indebted to the plaintiff in the full sum of said overcharges, to-wit, the sum of Six Thousand, Eight Hundred Eighty-two and 17/100 ($6,882.17) Dollars, with interest at the rate of 6% per annum from the respective dates upon which said respective overcharges were exacted, and plaintiff has been damaged in the full sum of said overcharges and interest thereon.

XVI.

That the sum of Twelve Hundred ($1200.00) Dollars is a reasonable sum to be allowed plaintiff as attorney's and counselor's fees herein.

WHEREFORE plaintiff prays for a judgment against the defendant in the sum of Six Thousand, Eight Hundred Eighty-two and 17/100 ($6,882.17) Dollars, with interest on the respective overcharges from the date of payment thereof, and for the further sum of Twelve Hundred ($1200.00) Dollars as attorney's and counselor's fees, and for his costs and disbursements incurred herein.

WILSON & GUTHRIE,

Attorneys for Plaintiff.

RECAPITULATION

Mason Ehrman, total overcharge	$3,619.51
Wadhams & Co., total overcharge	99.26
Lang & Co., total overcharge	55.14
Wadhams & Kerr, total overcharge	3,108.26
Total	$6,882.17

EXHIBIT A—MASON EHRMAN

Date Paid		6/ 4/18	Overcharge	$ 51.19
"	"	6/11/18	"	55.34
"	"	6/21/18	"	49.11
"	"	6/21/18	"	83.63
"	"	6/29/18	"	93.23
"	"	7/ 2/18	"	40.45
"	"	7/ 9/18	"	48.16
"	"	7/ 8/18	"	110.67
"	"	7/ 9/18	"	109.34
"	"	7/17/18	"	110.47
"	"	7/22/18	"	65.74
"	"	10/14/18	"	65.60
"	"	10/17/18	"	66.99
"	"	10/19/18	"	109.49
"	"	11/14/18	"	65.49
"	"	11/18/18	"	65.49
"	"	11/23/18	"	65.79
"	"	1/17/19	"	98.25
"	"	1/30/19	"	95.11
"	"	3/10/19	"	65.60
"	"	3/31/19	"	66.33

"	"	4/22/19.....	"	65.60
"	"	5/30/19.....	"	70.96
"	"	5/19/19.....	"	65.60
"	"	5/27/19.....	"	65.60
"	"	6/ 6/19.....	"	65.60

EXHIBIT C—MASON EHRMAN

Date	Paid	6/19/19.....	Overcharge	$ 65.60
"	"	6/26/19.....	"	65.60
"	"	6/27/19.....	"	77.67
"	"	7/ 7/19.....	"	65.60
"	"	7/14/19.....	"	65.60
"	"	7/16/19.....	"	65.60
"	"	7/22/19.....	"	42.06
"	"	7/28/19.....	"	77.82
"	"	7/31/19.....	"	42.04
"	"	8/28/19.....	"	75.07
"	"	8/29/19.....	"	39.37
"	"	9/ 5/19.....	"	40.17
"	"	10/22/19.....	"	66.16
"	"	11/12/19.....	"	66.35
"	"	11/21/19.....	"	66.26
"	"	11/22/19.....	"	39.54
"	"	11/26/19.....	"	39.49
"	"	11/25/19.....	"	65.79
"	"	12/16/19.....	"	72.79
"	"	7/ 8/18.....	"	44.81
"	"	7/ 8/18.....	"	58.60
"	"	7/22/18.....	"	41.35
"	"	2/18/19.....	"	34.90

"	"	3/27/19.....	"	41.36
"	"	4/11/19.....	"	41.36

EXHIBIT D—MASON EHRMAN

Date Paid		5/13/19.....	Overcharge $	41.36
"	"	6/13/19.....	"	41.36
"	"	6/30/19.....	"	27.58
"	"	10/16/19.....	"	41.21
"	"	10/ 2/19.....	"	41.36
"	"	10/15/19.....	"	24.82
"	"	11/10/19.....	"	3.58
"	"	11/17/19.....	"	5.72
"	"	.....	"	6.93
"	"	1/29/20.....	"	69.80

EXHIBIT G—WADHAMS & CO.

Date Paid		6/25/20.....	Overcharge $	48.33
"	"	10/14/19.....	"	50.93
"	"	8/14/19.....	"	55.14

EXHIBIT J—WADHAMS & KERR

Date Paid		12/18/18.....	Overcharge $	66.58
"	"	12/28/18.....	"	78.61
"	"	1/ 7/19.....	"	39.37
"	"	12/31/18.....	"	39.44
"	"	1/10/19.....	"	38.01
"	"	1/11/19.....	"	39.36
"	"	1/16/19.....	"	39.36
"	"	1/20/19.....	"	40.82

"	"	1/20/19.....	"	39.30
"	"	1/30/19.....	"	39.36
"	"	2/ 4/19.....	"	39.36
"	"	2/24/19.....	"	39.75
"	"	2/25/19.....	"	39.62
"	"	2/25/19.....	"	40.00
"	"	3/22/19.....	"	42.60
"	"	3/11/19.....	"	41.37
"	"	3/27/19.....	"	41.18
"	"	3/31/19.....	"	41.04
"	"	4/11/19.....	"	41.60
"	"	4/17/19.....	"	40.57
"	"	4/18/19.....	"	41.58
"	"	4/22/19.....	"	42.56
"	"	4/26/19.....	"	42.74
"	"	5/ 7/19.....	"	40.25
"	"	5/21/19.....	"	40.77
"	"	5/28/19.....	"	41.03
"	"	5/31/19.....	"	40.55
"	"	6/ 4/19.....	"	42.23
"	"	7/17/19.....	"	48.03
"	"	6/20/19.....	"	40.95
"	"	6/30/19.....	"	40.85

EXHIBIT J—WADHAMS & KERR

Date Paid		7/ 3/19.....	Overcharge	$ 39.89
"	"	7/ 7/19.....	"	39.78
"	"	7/ 8/19.....	"	39.35
"	"	7/21/19.....	"	39.35
"	"	7/21/19.....	"	42.21

"	"	7/24/19.....	"	39.35
"	"	7/26/19.....	"	39.36
"	"	7/30/19.....	"	43.22
"	"	7/28/19.....	"	39.35
"	"	7/31/19.....	"	43.15
"	"	8/21/19.....	"	42.73
"	"	8/27/19.....	"	39.94
"	"	8/23/19.....	"	42.34
"	"	8/29/19.....	"	43.25
"	"	9/ 5/19.....	"	46.47
"	"	10/ 3/19.....	"	44.23
"	"	11/13/19.....	"	68.04
"	"	11/24/19.....	"	71.38
"	"	12/19/18.....	"	41.43
"	"	12/30/18.....	"	25.25
"	"	12/31/18.....	"	25.05
"	"	1/ 7/19.....	"	28.99
"	"	1/ 7/19.....	"	27.84
"	"	1/11/19.....	"	25.57
"	"	1/16/19.....	"	24.95
"	"	1/18/19.....	"	25.19
"	"	1/18/19.....	"	29.83
"	"	1/22/19.....	"	25.02

EXHIBIT K—WADHAMS & KERR

Date	Paid	1/22/19.....	Overcharge	$ 44.17
"	"	2/ 5/19.....	"	24.77
"	"	2/19/19.....	"	25.08
"	"	3/ 4/19.....	"	24.92
"	"	3/11/19.....	"	25.15
"	"	3/15/19.....	"	24.96

"	"	5/13/19.....	"	24.82
"	"	5/24/19.....	"	25.28
"	"	6/ 3/19.....	"	25.13
"	"	5/31/19.....	"	25.34
"	"	7/19/19.....	"	25.13
"	"	7/25/19.....	"	25.13
"	"	7/ 3/19.....	"	24.82
"	"	7/ 9/19.....	"	25.13
"	"	7/11/19.....	"	24.82
"	"	7/24/19.....	"	24.77
"	"	7/26/19.....	"	24.82
"	"	8/ 5/19.....	"	24.82
"	"	8/16/19.....	"	25.12
"	"	9/ 8/19.....	"	25.63
"	"	9/22/19.....	"	26.93
"	"	10/ 4/19.....	"	48.64
"	"	10/25/19.....	"	32.55
"	"	10/24/19.....	"	27.59
"	"	10/23/19.....	"	41.39

On the 28th day of February, 1922, there was filed the following

AMENDED STIPULATION AMENDING COMPLAINT

IT IS HEREBY STIPULATED by and between the parties hereto by their respective attorneys as follows:

I.

That the stipulation heretofore entered into between

the parties hereto by their respective attorneys amending the complaint in the above entitled action may be amended to read as follows, and that the exhibits attached to said stipulation amending the complaint may be considered a part of and attached to this amended stipulation:

I.

That Paragraph XIV of plaintiff's complaint be deemed to be amended by adding to line 7, page 10, after the words "Exhibit J, Wadhams & Kerr, attached hereto," the words "and Supplemental Exhibit J attached to the stipulation amending complaint."

II.

That said complaint may be amended by adding a paragraph after Paragraph XIV to be designated as Paragraph XIV-a as follows:

That between the 25th day of June, 1918, and the 30th day of December, 1919, there was shipped from Crockett, California, to Portland, Oregon, via the line of the Southern Pacific Company over the route hereinabove specified, consigned to Allen & Lewis the number of car loads of sugar on the dates and of the weights shown in the exhibit marked "Supplemental Exhibit L" attached to the stipulation amending the complaint and made a part of this complaint, on all of which defendant received and collected as transportation charges 29c

per 100 lbs., together with a war tax of 3% thereon; that between the same dates there was shipped from San Francisco to Portland, Oregon, via the line of the defendant company over the route hereinabove specified, consigned to Allen & Lewis, the number of car loads of sugar on the dates and of the weight shown in the exhibit marked "Supplemental Exhibit M" attached to the stipulation amending the complaint and made a part of this complaint, on all of which defendant received and collected as transportation charges the sum of 25c per 100 lbs., together with a war tax of 3% thereon; and that between the 31st day of December, 1919, and February 29th, 1920, there were shipped from Crockett, California, to Portland, Oregon, via the line of the Southern Pacific Company over the route hereinabove specified, consigned to Allen & Lewis, the number of car loads of sugar on the dates and of the weights shown in the exhibit marked "Supplemental Exhibit N" attached to the stipulation amending the complaint and made a part of this complaint, on all of which defendant received and collected as transportation charges 29c per 100 lbs., together with a war tax of 3% thereon.

III.

That said complaint may be amended by adding a paragraph thereto to be known as XIV-b, as follows:

That between the 25th day of June, 1918, and the 31st day of December, 1919, there was shipped from San Francisco to Portland, Oregon, via the line of the Southern Pacific Company, over the route hereinabove

specified, consigned to Carr & Preston Co., the number of car loads of sugar on the dates and of the weights shown in the exhibit marked "Supplemental Exhibit O" attached to the stipulation amending the complaint and made a part of this complaint, on all of which defendant received and collected as transportation charges 25c per 100 lbs., together with a war tax of 3% thereon.

IV.

That the complaint may be amended by adding a paragraph thereto, to be known as XIV-c as follows:

That between the 29th day of December, 1917, and the 24th day of June, 1918, there were shipped from Crockett, California, to Portland, Oregon, via the line of the Southern Pacific Company, over the route hereinabove specified, consigned to Meier & Frank Company, one car load of sugar on the date and of the weight shown in the exhibit marked "Supplemental Exhibit X," attached to this amended stipulation amending the complaint, and made a part of this complaint, on which defendant received and collected as transportation charge 23c per 100 lbs., together with war tax of 3% thereon; and that between the 25th day of June, 1918, and the 29th day of February, 1920, there was shipped from Crockett, California, to Portland, Oregon, via the line of the Southern Pacific Company over the route hereinabove specified, to Meier & Frank Company, one car load of sugar on the date and of the weight shown in the exhibit marked "Supplemental Ex-

hibit Y," attached to this amended stipulation amending complaint, and made a part of this complaint, on which defendant received and collected as transportation charge 29c per 100 lbs., together with a war tax of 3% thereon.

V.

That said complaint may be amended by adding a paragraph thereto, to be known as XIV-d, as follows:

That between the 29th day of December, 1917, and the 24th day of June, 1918, there was shipped from San Francisco, California, to East Portland, Oregon, via the line of the Southern Pacific Company, over the route hereinabove specified, consigned to Starr Fruit Products Company, the number of car loads of sugar on the dates and of the weights shown in the exhibit marked "Supplemental Exhibit Z," attached to this amended stipulation amending the complaint, and made a part of this complaint, on all of which defendant received and collected as transportation charge 20c per 100 lbs., together with a war tax of 3% thereon; and that between the 25th day of June, 1918, and the 29th day of February, 1920, there was shipped from San Francisco, California, to East Portland, Oregon, via the line of the Southern Pacific Company over the route hereinabove specified, consigned to Starr Fruit Products Company, the number of car loads of sugar on the dates and of the weights shown in the exhibit marked "Supplemental Exhibit Z-a" attached to this amended stipulation amending complaint, and made a

part of this complaint, on all of which defendant received and collected as transportation charge 25c per 100 lbs., together with a war tax of 3% thereon.

VI.

That Paragraph XV may be deemed amended by adding to the end of the line 30, page 10, of said complaint, the names, Allen & Lewis, Carr & Preston Co., Tru Blu Biscuit Company, Meier & Frank Company, and Starr Fruit Products Company, and by amending the amount in line 7, page 11, to read Seven Thousand, Eight Hundred Six & 5/100 ($7,806.05) Dollars, and by changing the amount in the prayer to read Seven Thousand, Eight Hundred Six & 5/100 ($7,806.05) Dollars.

IT IS FURTHER STIPULATED that the answer to plaintiff's complaint be deemed amended to contain a denial of all of the amended matter contained in the stipulation amending complaint.

JAMES G. WILSON,
of Attorneys for Plaintiff.

BEN E. DEY,
Attorney for Defendant.

SUPPLEMENTAL EXHIBIT "J"

Date Paid	7/21/19.....	Overcharge	$ 48.70
" "	6/17/19.....	"	39.35

SUPPLEMENTAL EXHIBIT "L"

Date Paid 1/20/19.....Overcharge $ 39.29
" " 1/30/19..... " 43.26

SUPPLEMENTAL EXHIBIT "M"

Date Paid 1/30/19.....Overcharge $ 24.82

SUPPLEMENTAL EXHIBIT "N"

Date Paid 1/31/20.....Overcharge $ 67.89

SUPPLEMENTAL EXHIBIT "O"

Date Paid 10/16/19.....Overcharge $ 31.96

SUPPLEMENTAL EXHIBIT "P"

Date Paid 11/19/19.....Overcharge $ 73.90

SUPPLEMENTAL EXHIBIT "Q"

Date Paid 3/ 6/19.....Overcharge $ 31.02

RECAPITULATION

Wadhams & Kerr	$ 88.05
Allen & Lewis	175.26
Carr & Preston	31.96
Tru Blu	104.92
Total	$400.19

SUPPLEMENTAL EXHIBIT X

Date Paid 6/20/18.....Overcharge $ 52.72

SUPPLEMENTAL EXHIBIT Y

Date Paid		7/29/18.....	Overcharge	$ 77.66

SUPPLEMENTAL EXHIBIT Z

Date Paid		5/23/18.....	Overcharge	$ 31.99
"	"	5/17/18.....	"	31.99
"	"	5/22/18.....	"	31.99
"	"	5/17/18.....	"	31.99

SUPPLEMENTAL EXHIBIT Z-a

Date Paid		10/ 7/18.....	Overcharge	$ 24.57
"	"	9/28/18.....	"	20.67
"	"	8/ 1/19.....	"	41.34
"	"	8/ 9/19.....	"	48.25
"	"	8/ 9/19.....	"	41.34
"	"	8/12/19.....	"	41.34
"	"	10/17/19.....	"	47.84

On September 30, 1922, there was filed to said complaint as amended the following

DEMURRER TO AMENDED COMPLAINT

Comes now the above named defendant and demurs to the amended complaint on file herein on the following grounds:

I.

That this court has no jurisdiction of the subject matter of the action.

II.

That the amended complaint does not state facts sufficient to constitute a cause of action.

In presenting the first ground of the demurrer, this defendant will rely upon the theory that the Interstate Commerce Commission has exclusive original jurisdiction of actions of this character.

In presenting the second ground of the demurrer, this defendant will rely upon the facts that the amended complaint fails to allege facts from which it can be made to appear that the plaintiff has suffered any damages whatsoever, and the further facts that it affirmatively appears on the face of said amended complaint that plaintiff was not the original owner of said alleged choses in action, but on the contrary brings action upon the same as the assignee of the original owners thereof, and that said amended complaint fails to allege that the warrant for the payment of said alleged choses in action had been issued at or prior to the time of execution of said alleged assignments, and further fails to allege that said assignments were executed with the formalities required by Section 3477 of the Revised Statutes of the United States, and that therefore said alleged assignments are made null and void by the provisions of said Section 3477 of the Revised Statutes of the United States, and the further fact that the Director General of Railroads was not at any time mentioned in the amended complaint, and is not now amenable to the

short and long haul provision of the fourth section of the act to regulate commerce, as amended.

A. M. BULL,
PAUL P. FARRENS,

Attorneys for Defendant.

STATE OF OREGON,
COUNTY OF MULTNOMAH—ss.

I, PAUL P. FARRENS, one of attorneys for defendant, hereby certify that in my opinion the foregoing demurrer is well founded in law.

PAUL P. FARRENS.

And afterwards, on the 2d day of January, 1923, there was rendered on said demurrer, by Honorable Charles E. Wolverton, Judge of said Court, the following

OPINION:

The plaintiff is endeavoring to recover upon assigned claims for rebate for alleged overcharges, above the tariff rates for carrying freight.

The sole question presented for decision is whether the assignee of such claims may be permitted to sue thereon, in view of Section 3477, U. S. Revised Statutes. This statute renders all transfers and assignments of any claim upon the United States null and void, unless they are freely made and executed in a manner prescribed, after the allowance thereof the ascertain-

ment of the amount due, and the issuance of a warrant for the payment of the same.

Plaintiff's counsel contend that this statute is inapplicable, because of the provisions of Section 10 of the Federal Control Act (40 Stat. 451, 456), which are, so far as pertinent:

> "That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or any other Act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government."

I am impressed that the question has been disposed of by the holding of the court, in Missouri Pacific R. R. Co. v. Ault, 256 U. S. 554, 559, that, the plain purpose of the provision being to preserve to the general public the rights and remedies against carriers which it enjoyed at the time the railroads were taken over by the President, except in so far as such rights or remedies might interfere with the needs of federal operation:

> "The Government was to operate the carriers, but the usual immunity of the sovereign from legal liability was not to prevent the enforcement of liabilities ordinarily incident to the operation of carriers. * * * The courts were to go on entertaining suits and entering judgments under existing law, but the property in the hands of the President for war purposes was not to be disturbed."

I am unable to agree with counsel for defendant in the view that the contention here presented is in no wise based upon the ground that the Director General is an instrumentality of the Government. The action stands as though it were brought against the Government, the Federal Control agent standing in its stead, and the intendment of the act is to extend to suitors all the rights and privileges to which they were entitled previous to the adoption of the Federal Control Act, save as restricted by the needs of the Government for war purposes. If the claimant could sue then upon an assigned claim without having observed the injunctions of Section 3477 in procuring the assignment, he may sue now, notwithstanding the Government is in effect the party sued. The section is therefore inapplicable, defensively considered.

Demurrer overruled.

And thereafter on said 2nd day of January, 1923, there was made and entered the following

ORDER.

This cause was heard by the Court upon the demurrer to the complaint as amended and was argued by Mr. James G. Wilson, of counsel for the plaintiff, and by Mr. Paul P. Farrens, of counsel for the defendant; On Consideration whereof,

IT IS ORDERED AND ADJUDGED that said demurrer be, and the same is hereby, overruled.

And thereafter on the 19th day of January, 1923, there was served and filed the following

ANSWER.

Comes now the defendant above named and for answer to plaintiff's amended complaint, admits, denies and alleges as follows:

I.

Admits each and every allegation contained in paragraph I.

II.

Denies each and every allegation contained in paragraph II of said amended complaint, except defendant admits that Southern Pacific Company is a corporation organized and existing under and by virtue of the laws of the State of Kentucky, and is and was at all times mentioned in plaintiff's amended complaint the owner

of a line of railroad extending from points in California, in said amended complaint mentioned, to the easterly bank of the Willamette River, in Portland, Oregon, and further admits that the Oregon-Washington Railroad & Navigation Company, a corporation organized and existing under and by virtue of the laws of the State of Oregon, is the owner of a line of railroad extending from St. Johns to the easterly bank of the Willamette River, in Portland, Oregon.

III.

Admits each and every allegation contained in paragraph III except that defendant denies that either the Southern Pacific Company or the Oregon-Washington Railroad & Navigation Company own lines of railroad which reach the station known as Portland.

IV.

Admits each and every allegation contained in paragraph IV of said amended complaint except that the defendant denies that either the Oregon-Washington Railroad & Navigation Company or the Southern Pacific Company own a line or lines of railroad extending to the station of Portland, State of Oregon.

V.

Admits each and every allegation contained in para-

graph V of said amended complaint except that defendant denies that it ever published and filed tariffs establishing a rate on sugar in carload lots, to be applied on transportation of sugar from points in California, named in paragraph III of plaintiff's amended complaint, to the station of Portland, to be applied on shipments when destined to points on the line of the Oregon-Washington Railroad & Navigation Company beyond the station of Portland, and further denies that the tariff and supplements referred to in paragraph V of plaintiff's amended complaint, provided that rates from said originating points in California to points on the line of Oregon-Washington Railroad & Navigation Company should be made by adding the said proportional rates so established to the local rate from the station of Portland, established by Oregon-Washington Railroad & Navigation Company from said station of Portland to stations on the Oregon-Washington Railroad & Navigation Company's line.

VI.

Denies each and every allegation contained in paragraph VI of said amended complaint.

VII.

Denies each and every allegation contained in paragraph VII of said amended complaint except that defendant admits that upon the commencement of federal control of railroads the President of the United States

initiated rates, fares, charges, classifications, regulations and practices in the manner prescribed by law, and thereafter in like manner initiated all changes in rates, fares, charges, classifications, regulations and practices that became effective during the period of federal control of railroads.

VIII.

Denies each and every allegation contained in paragraph VIII of said amended complaint.

IX.

Admits each and every allegation contained in paragraph IX of said amended complaint.

X.

Denies each and every allegation contained in paragraphs X, XI, XII, XIII, XIV, XIV-a, XIV-b, XIV-c, XIV-d and XV.

XI.

Denies that the sum of $1200 or any other sum or sums of money whatsoever is a reasonable sum to be allowed plaintiff as attorney's and counsellor's fees herein.

And for a further, separate and affirmative answer and defense to plaintiff's amended complaint, defendant alleges:

I.

That from and after twelve o'clock noon on December 28, 1917, to midnight of February 29, 1920, which period will hereinafter be designated as the period of federal control, the President of the United States, acting by and through the Director General of Railroads, United States Railroad Administration, was in control of the lines of railroad of Southern Pacific Company and of the Northern Pacific Terminal Company, and of the line of railroad extending upon and across that certain railroad bridge over the Willamette River at a location near the Union Station, in the City of Portland, Oregon.

II.

That during the period of federal control the President of the United States, acting by and through the Director General of Railroads, United States Railroad Adminstration, in the manner prescribed by law initiated all tariffs, rates, fares, charges, classifications, regulations and practices applicable to the shipment of sugar in carload lots from San Francisco, Marysville, Hamilton, Crockett and other points designated in plaintiff's amended complaint as "Group 1 Points," Alvarado, Salinas, Visalia and Betteravia, in California, to the station of Portland, in Oregon, by filing the same

with the Interstate Commerce Commission, and that all charges collected by the United States Railroad Administration for the transportation of sugar in carload lots between said points were based upon and authorized by said tariffs and rates.

III.

That among other orders issued by the President of the United States, acting by and through the Director General of Railroads, United States Railroad Administration, was an order issued May 25, 1918, at Washington, D. C., commonly known as "General Order No. 28," which said order of the President of the United States initiated tariffs, rates, fares, charges, classifications, regulations and practices to be effective June 25, 1918; that said tariffs, rates, fares, charges, classifications, regulations and practices were duly filed with the Interstate Commerce Commission, and that from and including June 25, 1918, until the termination of federal control of railroads, said tariffs, rates, fares, charges, classifications, regulations and practices constituted the only tariffs, fares, charges, classifications, regulations and practices lawfully applicable to the transportation of sugar in carload lots from points of origin herein mentioned to the station of Portland in the City of Portland.

IV.

That on May 27, 1918, the Interstate Commerce Commission issued its Fourth Section Order No. 7316, in words and figures as follows:

"Fourth Section Order No. 7316. General No. 17. At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 27th day of May, A. D. 1918.

"WHEREAS, The President of the United States through the Director General, United States Railroad Administration, has initiated and prescribed rates, fares, charges, and classifications to be applied on all traffic carried by railroad and steamship lines under federal control, except traffic carried entirely by water to and from foreign countries, as set forth in General Order No. 28, dated May 25, 1918, of said Director General;

"And WHEREAS, the said Director General has requested such relief from the long-and-short-haul and aggregate-of-the-intermediate provision of Section 4 of the act to regulate commerce as will permit said carriers under federal control to file schedules containing rates, fares, charges, or classifications containing departures from the aforesaid provisions of Section 4, enabling carriers under federal control, in the present emergency, to secure increased revenues to be derived from increases in rates, fares, charges and classifications initiated and prescribed by said General Order No. 28 of May 25, 1918;

"It is ordered, that in those instances in which carriers under federal control are required by General Order No. 28 of the Director General, United

States Railroad Administration, to apply to the movement of traffic locally or jointly, or jointly with carriers not under federal control, higher rates, fares, charges and classifications for shorter than for longer distances over the same line or route in the same direction, the shorter being included within the longer distance, or rates, fares, charges and classifications which exceed the aggregate of the intermediate rates, fares, charges and classifications, as set forth in General Order No. 28 of the Director General, the said carriers be, and they are hereby, authorized to establish such rates, fares, charges and classifications prescribed in said General Order No. 28 of the Director General without observing the provisions of the Fourth Section of the Act to regulate commerce.

"And it is further ordered, that carriers not under federal control maintaining joint rates, fares, charges, and classifications with carriers under federal control may establish such joint rates, fares, charges and classifications as are necessary to comply with the terms of the said General Order No. 28 of the Director General, without observing the provisions of the Fourth Section of the Act to regulate commerce.

"It is further ordered, that this order shall supersede and take the place of any provision or provisions of any Fourth Section order or orders heretofore issued that may be in conflict herewith.

"The Commission does not hereby approve any rates, fares, charges, and classifications that may be filed under this permission, all such rates, fares, charges and classifications being subject to complaint, investigation, and correction if in conflict with any provisions of the act.

By the commission:

(SEAL) George B. McGinty,
Secretary."

That said Fourth Section Order No. 7316 was in full force and effect from and including June 27, 1918, to and including the 29th day of February, 1920.

WHEREFORE, having fully answered plaintiff's amended complaint, defendant prays that the same be dismissed and that it have and recover of and from plaintiff its costs and disbursements herein, and such sum as the court shall find and determine to be a reasonable attorney's fee herein.

A. M. BULL,
PAUL P. FARRENS,
Attorneys for Defendant.

And thereafter on the 20th day of January, 1923, there was duly filed in said Court the following

DEMURRER TO ANSWER

Comes now the plaintiff above named and demurs to the further, separate and affirmative answer and de-

fense of plaintiff's amended complaint contained in the answer of said defendant on the ground and for the reason that said further, separate and affirmative answer does not state facts sufficient to constitute a defense to plaintiff's complaint.

JAMES G. WILSON
GEO. B. GUTHRIE,
Attorneys for Plaintiff.

I, JAMES G. WILSON, one of the attorneys for plaintiff in the above entitled action, hereby certify that the foregoing demurrer is in my opinion well founded in law.

JAMES G. WILSON.

On the argument of said demurrer, said plaintiff will rely upon the following points, to-wit:

I.

That it is nowhere alleged in said answer that the defendant or its predecessors, the Southern Pacific Company, or any agent or carrier, made any application to the Interstate Commerce Commission for permission to charge more for the transportation from the originating points alleged in plaintiff's complaint to Portland, than said carriers were permitted to charge for the transportation over said lines in connection with the Oregon-Washington Railroad & Navigation Company to St. Johns. That no hearing was had with reference

to said violation of the Interstate Commerce Act, and no order made permitting the same.

II.

That it is nowhere alleged in said complaint that as a basis for the said purported order of the Interstate Commerce Commission that any application or hearing was had with reference to the violation of the 4th Section of the Interstate Commerce Act involved in this procedure; that the 4th Section of the Act to regulate commerce provides that the Interstate Commerce Commission may permit charging a greater sum for a lesser haul over the same line or route only in special cases, after application and a hearing before the Commission thereon; that no such application or hearing was had with reference to the violation involved in this case, and that no general order of the Commission of the nature set out in said affirmative answer was made to legalize any violation not specifically covered in the application and not considered by the Commission.

United States v. Merchants Association, 242 U. S. 187.

Davis v. Parrington, 281 Fed. 10, 16.

JAMES G. WILSON,
GEO. B. GUTHRIE,
Attorneys for Plaintiff.

And thereafter, to-wit: on the 5th day of February, 1923, there was rendered on said demurrer to answer

by Honorable R. S. Bean, Judge of said Court, the following

OPINION

I do not understand that the Federal Control Act (40 St. 456) gave the President power and authority to initiate rates in violation of Section 4 of the Interstate Commerce Act (36 St. 547) without the approval of the Interstate Commerce Commission (Parrington vs. Davis, this court, April 4, 1921) nor that the Commission can, by a general order, suspend the operation of such section, "but only acting separately in respect to particular carriers and only after consideration of the special circumstances existing." (U. S. vs. Merchants, etc., Assn., 242 U. S. 178-187.)

Demurrer sustained.

And thereafter on said 5th day of February, 1923, there was made and entered the following

ORDER SUSTAINING DEMURRER

This cause was heard by the court upon the demurrer of plaintiff to the further and separate defense herein, plaintiff appearing by Mr. James G. Wilson, of counsel, and defendant by Mr. Paul P. Farrens, of counsel. Upon Consideration Whereof

IT IS ORDERED that said demurrer be and the same is hereby sustained.

Thereafter on the 29th day of May, 1923, there was duly filed the following

NOTICE.

To A. J. Parrington, Plaintiff above named, and to Messrs. Wilson & Guthrie, his Attorneys:

You are hereby notified that upon the re-argument of the points of law involved in the above entitled case to be presented pursuant to agreement of counsel and consent of the court, defendant will urge in support of the second ground of his demurrer to the amended complaint (which said second ground was to the effect that the amended complaint does not state facts sufficient to constitute a cause of action) that all claims set forth in said amended complaint, which accrued more than two years prior to the date of the filing of said complaint, are barred by the Statute of Limitation set forth in Section 16 of the Act to Regulate Commerce, as amended, and as construed by the United States Supreme Court in the cases of Phillips vs. Grand Trunk Western Railway Company, 236 U. S. 662, 667, and Kansas City Southern Ry. Co. vs. Wolfe, decided by the United States Supreme Court February 19, 1923. The foregoing contention, based on said Statute of Limitation, will be urged in addition to the other points specifically mentioned in said demurrer to said amended complaint as relied upon in support of the said second ground of said demurrer.

A. M. BULL,
PAUL P. FARRENS,
Attorneys for Defendant.

And thereafter said cause came on for trial before Honorable R. S. Bean, District Judge, on the 1st, 4th and 5th days of June, 1923, and the Court having taken said cause under advisement did thereafter on the 19th day of July, 1923, make and file in said Court the following

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter coming on for trial on the 1st day of June, 1923, and evidence having been introduced in behalf of both parties, and arguments had on June first, fourth and fifth, 1923, before the Court without a jury, a jury having been waived by both parties by stipulation in writing filed herein, the plaintiff appearing by James G. Wilson, his attorney, and the defendant appearing by Paul P. Farrens and A. M. Bull, of his attorneys, and the Court having taken the matter under advisement until this time, and being fully advised, does now make the following Findings of Fact and Conclusions of Law, to-wit:

FINDINGS OF FACT

I.

That the Southern Pacific Company is and was during all times mentioned in plaintiff's complaint, the owner of a line of railroad extending from the originating points mentioned in plaintiff's complaint to East Portland in the State of Oregon, and is and was the

owner of a one-half interest in the railroad bridge extending from East Portland to Portland, Oregon, and is a joint lessee of the tracks and facilities of the Northern Pacific Teminal Company of Oregon in Portland, Oregon, has full rights of operating trains over said bridge and over the facilities and tracks of the Northern Pacific Terminal Company of Oregon, and has full rights to operate a line of railroad extending from said points of origin to all points reached by the tracks of the Northern Pacific Terminal Company of Oregon in the City of Portland, Oregon.

II.

That the Oregon-Washington Railroad & Navigation Company at all times mentioned in the complaint was a joint lessee of the tracks and facilities of the Northern Pacific Terminal Company of Oregon, with operating rights thereover in the City of Portland, Oregon, was the owner of a one-half interest in the bridge across the Willamette River from Portland to East Portland, Oregon, with full operating rights thereover, and was the owner of a line of railroad from East Portland to St. Johns in the State of Oregon, and had full operating rights from all points reached by the Northern Pacific Terminal Company of Oregon's tracks in the City of Portland to St. Johns, Oregon.

III.

That the stations known as Portland, East Portland and St. Johns, are all within the State of Oregon and

within the corporate limits of the City of Portland, Oregon.

IV.

That from and after twelve o'clock noon of December 28th, 1917, to midnight, February, 1920, which period was known as the period of Federal Control, the United States Railroad Administration was in control of the lines of railroad of the Southern Pacific Company extending from the points of origin designated in the complaint in California, to Portland, Oregon, including the operating rights of said Southern Pacific Company over the bridge across the Willamette River between East Portland and Portland, and the rights over the terminal facilities and tracks of the Northern Pacific Terminal Company of Oregon, and was likewise during said period in possession and control of the line of railroad of the Oregon-Washington Railroad & Navigation Company between the stations of Portland and St. Johns, including the rights of said company over the tracks and facilities of the Northern Pacific Terminal Company of Oregon and across said Willamette River bridge between Portland and East Portland, and also operating said lines in interstate commerce as a common carrier under authority of the United States and the Director General of Railroads, and pursuant to tariffs, rules and regulations for such purpose adopted and provided.

V.

That at the stations of East Portland, Oregon, and Portland, Oregon, the line of railroad of the Southern

Pacific Company connects with the line of railroad of the Oregon-Washington Railroad & Navigation Company, and that prior to the period of Federal Control the Southern Pacific Company published and filed with the Interstate Commerce Commission rates on sugar in carload lots of the minimum weight of 44,000 pounds to be applied on the transportation of sugar from San Francisco, Marysville, Hamilton, Crockett and other points designated in the tariff as Group 1 points, Alvarado, Salinas, Visalia and Betteravia to the stations of Portland and East Portland to be applied on shipments when destined to points on the line of the Oregon-Washington Railroad & Navigation Company beyond Portland and East Portland, and that said rates so established from San Francisco, Crockett, Alvarado, Marysville, Hamilton and other points named in said tariff as Group 1 points, were 13 cents per 100 pounds; from Salinas and Visalia, 20½ cents per 100 pounds; and from Betteravia, 23 cents per 100 pounds; and that it was provided in said tariff that the rates from said originating points in California to points on the line of the Oregon-Washington Railroad & Navigation Company should be made by adding the said rate known as the proportional rate so established to the local rate from Portland or East Portland established by the Oregon-Washington Railroad & Navigation Company from Portland or East Portland to point of destination, including rates to stations on the Oregon-Washington Railroad & Navigation Company's line, contained in said company's Tariff No. 6-B, I. C. C. 283, effective March 15th, 1914, and amendments and reissues thereof; that in

and by Supplement No. 57 of Pacific Freight Tariff Bureau Joint and Proportional Freight Tariff 1B, I. C. C. 110, effective June 25th, 1918, which was published and filed with the Interstate Commerce Commission, said proportional rate from said points in California to Portland and East Portland was increased so that the rate from and after the 25th day of June, 1918, became 16½ cents per 100 pounds from San Francisco, Marysville, Hamilton, Crockett, Alvarado and Group 1 points to Portland and East Portland; 25½ cents per 100 pounds from Salinas and Visalia to Portland and East Portland; and 29 cents per 100 pounds from Betteravia to Portland and East Portland, which said rate was continued in effect by said supplement and re-issues of said tariff up to and subsequent to the termination of Federal Control.

VI.

That the Oregon-Washington Railroad & Navigation Company published and filed with the Interstate Commerce Commission its Local Tariff No. 6-B, I. C. C. No. 283, effective March 15th, 1914, wherein, by Item 70, it established and put in effect the rate from its stations of Portland and East Portland to its station of St. Johns in the State of Oregon of 37½ cents per ton of 2,000 pounds, with a minimum charge of $7.50 per car, which rate applied on sugar in carload lots; that said rate was continued in effect by said tariff and supplements and re-issues thereof up to and including the 30th day of December, 1919; that thereafter, in and

by Supplement No. 23 of Oregon-Washington Railroad & Navigation Company's Local Freight Tariff No. 6-C, I. C. C. No. 312, Item 60-G published and filed with the Interstate Commerce Commission, and made effective December 31st, 1919, the said carrier established a rate from its station of Portland to its station of St. Johns of $7.50 per car, which had reference to note reading as follows:

> "Applies only on freight interchanged with water carriers at St. Johns, Or., and when delivered to or received from railroad connections of O.-W. R. & N. at East Portland, Or., or Portland, Ore., in line haul movement. Will not apply on carload freight originating at or destined to points reached via O.-W. R. & N. Lines and its Connections where line haul can be performed by O.-W. R. & N. Lines."

That said tariff also continued in effect the rate of 37½ cents per 100 pounds between Portland, Oregon, and St. Johns, Oregon, without restriction, which said tariff continued in effect during the period of Federal Control; the Court finds that the item providing for $7.50 per car applied on shipments of sugar over the lines in question from points of origin to St. Johns, Oregon.

VII.

That the United States Railroad Administration adopted and continued in effect the rates of the South-

ern Pacific Company and the Oregon-Washington Railroad & Navigation Company established before the period of Federal Control, and in effect at the time of the inception of said Federal Control, and joined in and were parties to the said rates established during said control.

VIII.

That the station of St. Johns is more distant from San Francisco, Marysville, Hamilton, Crockett, Alvarado, Visalia, Salinas and Betteravia over the line of the Southern Pacific and the Oregon-Washington Railroad & Navigation Company by the route over which said rates were established as hereinbefore found than the station of Portland, Oregon, or the station of East Portland, Oregon, and the haul over said route between said points of origin in California to Portland in the State of Oregon is included within the haul over said route from said point of origin in California to St. Johns in the State of Oregon, and is in the same direction and over the same line or route, and the haul to Portland and to East Portland in the State of Oregon over said route is included within the haul from said point of origin in California to St. Johns in the State of Oregon, and on all shipments over said route from Crockett, Port Costa, (a point in Group 1), Alvarado and Salinas, from January 1st, 1918, to and inclusive of June 24th, 1918, the United States Railroad Administration charged and collected the sum of 23 cents per 100 pounds on sugar in carload lots; and from San

Francisco to Portland charged and collected the sum of 20 cents per 100 pounds; and from Betteravia and Hamilton the sum of 25 cents per 100 pounds; and from Visalia the sum of 27½ cents per 100 pounds; and in addition thereto collected thereon War Tax at the rate of three per cent. of the transportation charge; and on all shipments between and inclusive of June 25th, 1918, and the end of Federal Control said Railroad Administration charged and collected on said shipments in carload lots from Crockett, Port Costa, Alvarado and Salinas the sum of 29 cents per 100 pounds; from San Francisco 25 cents per 100 pounds; from Betteravia and Hamilton 31½ cents per 100 pounds; together with a War Tax of three per cent. on the transportation charge.

IX.

That said charges were to the extent that the same exceeded the rate established and in effect from the various points in California to the station of St. Johns in the State of Oregon at the same time illegal and unlawful and charged without authority of law, and the exaction of the War Tax on the excess of such charges of said rates from said respective points in California to St. Johns was illegal and unlawful and exacted without authority of law and in violation of Section 4 of the Act of Congress known as the Act to Regulate Commerce and amendments thereto, and that the only lawful rate in effect from January 1st, 1918, to and inclusive of June 24th, 1918, was as follows:

From Crockett, Port Costa, Alvarado, San Francisco and Hamilton, 14⅞ cents per 100 pounds; from Betteravia, 24⅞ cents per 100 pounds, and from Visalia and Salinas, 22⅜ cents per 100 pounds; plus a War Tax of three per cent. upon the transportation charge; and that the only lawful rate to Portland or East Portland from June 25th, 1918, to and inclusive of December 30th, 1919, from the various points in California was as follows:

From Crockett, Port Costa, Alvarado, San Francisco and Hamilton, 18⅜ cents per 100 pounds; from Betteravia, 30⅞ cents per 100 pounds, and from Visalia and Salinas, 27⅜ cents per 100 pounds; plus a War Tax of three per cent. upon the transportation charge; and that the only lawful rate in effect to Portland or East Portland from said various points in California between the 31st day of December, 1919, and the end of Federal Control was as follows:

From Crockett, Port Costa, Alvarado, San Francisco and Hamilton, 16½ cents per 100 pounds, plus $7.50 per car; from Betteravia, 29 cents per 100 pounds, plus $7.50 per car; and from Visalia and Salinas, 25½ cents per 100 pounds, plus $7.50 per car; plus a War Tax of three per cent. upon the transportation charge.

X.

That the plaintiff's assignors shipped over the lines of the Southern Pacific from the points of origin shown,

the shipments listed in the exhibits attached to the complaint and the stipulations amending the complaint filed in this cause, and paid to the United States Railroad Administration for such transportation, including War Tax, the amount shown in the column headed "Freight, incl. war tax if any"; and the said United States Railroad Administration charged and collected the freight at the rate shown in the column headed "Rate", and the aggregate amount shown in the column headed "Freight, Inc. War Tax if any"; that said collections were made on the dates shown in the column headed "Date Paid", and said shipments were made consigned to the persons shown at the head of each of said exhibits, and the freight was paid by such persons, and that each and all of said persons shown as consignees in said various exhibits paid to the United States Railroad Administration the freight charges on said various shipments shown in said column headed "Freight Incl. War Tax if any"; and that each and all of said consignees did, prior to the filing of said complaint and the stipulations amending said complaint, sell, transfer and assign to the plaintiff their claims for the exaction by the United States Railroad Administration for the transportation of said shipments, and the plaintiff is now the lawful owner and holder thereof; that the amount of said unlawful exaction over and above the legal rate on the shipments so made, is the sum of Seven Thousand, Eight Hundred, Six Dollars and Five Cents ($7,806.05).

XI.

That the Court finds that a reasonable attorney's

fee in this Court for the collection of said claims is the sum of Seven Hundred and Fifty Dollars ($750.00); said attorney's fee to cover only the work with reference to collection in this Court and not on any appeal therefrom.

From the foregoing Findings of Fact the Court makes the following

CONCLUSIONS OF LAW

I.

That the charges collected from the plaintiff's assignors for the transportation of sugar in carload lots from the various points of origin in California to Portland and East Portland were illegal and in violation of the amended 4th Section of the Act to Regulate Commerce to the extent that the same exceeded the rates established and in effect from said various originating points to St. Johns in the State of Oregon at the time of the movement of said respective shipments.

II.

That the defendant is liable to the plaintiff for the excess charges over and above the charges which would have been assessed at the rate in effect between the said originating points and St. Johns at the time the respective shipments moved.

III.

That the plaintiff is entitled to judgment against

the defendant for the sum of Seven Thousand, Eight Hundred, Six Dollars and Five Cents ($7,806.05), together with interest at the rate of six (6) per cent. per annum from June 1st, 1919, together with the sum of Seven Hundred and Fifty Dollars ($750.00) attorney's fees, and plaintiff's costs and disbursements incurred herein.

July 19, 1923.

R. S. BEAN,
Judge.

And afterward on said 19th day of July, 1923, there was made, entered and filed in said Court and cause the following:

JUDGMENT.

This matter coming on on application of the plaintiff for entry of judgment in the above entitled cause, plaintiff appearing by his attorney, James G. Wilson, and the defendant appearing by Paul P. Farrens and A. M. Bull, of its attorneys, and the Court having heretofore filed its findings of fact and conclusions of law, and being fully advised in the premises

IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED that the plaintiff A. J. Parrington have and recover of and from the defendant James C. Davis, Agent United States Railroad Administration, judgment in the sum of Seven Thousand, Eight Hundred, Six Dollars and Five Cents ($7,806.05), together with interest at the rate of six (6)

per cent per annum from the first day of June, A. D. 1919, and the sum of Seven Hundred and Fifty Dollars ($750.00) allowed as attorney's fees in this Court, and the plaintiff's further costs and disbursements herein taxed and allowed in the sum of ..... Dollars.

IT IS FURTHER ORDERED AND ADJUDGED that the defendant pay said sum promptly to the plaintiff as required by Section 206 of the Transportation Act of 1920.

Done and dated in open Court this 19th day of July, A. D. 1923.

R. S. BEAN, Judge.

That thereafter, on said 19th day of July, 1923, there was made and entered the following

ORDER.

Pursuant to the stipulation of the parties hereto,

IT IS HEREBY ORDERED AND ADJUDGED that defendant may have to and including September 15th, 1923, within which to serve and tender his bill of exceptions herein.

R. S. BEAN, Judge.

That thereafter, prior to the 15th day of September, 1923, there was served, tendered and lodged with the clerk of said Court, a Bill of Exceptions, and thereafter, on October 18, 1923, the Court settled, allowed and approved the following

BILL OF EXCEPTIONS.

BE IT REMEMBERED, that the foregoing cause came on to be heard on the 29th day of May, 1923, before the Honorable R. S. Bean, Judge of the above entitled court, plaintiff appearing by James G. Wilson, defendant appearing by A. M. Bull and Paul P. Farens, respectively the attorneys, and jury by a stipulation in writing filed in this court was waived and said cause tried to the court.

Whereupon the following proceedings were had:

TESTIMONY OF A. J. PARRINGTON ON HIS OWN BEHALF.

A. J. PARRINGTON, plaintiff, called as a witness on his own behalf, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. WILSON.

I reside at Portland, Oregon. My business is that of shippers' traffic agent. Practically all my business life has been spent in the transportation line. The last years of my railroad experience was in the traffic department of the Oregon-Washington Railroad & Navigation Company. Since then I have been acting in my present capacity.

San Francisco, Marysville, Hamilton, Crockett, Alvarado, Salinas, and Visalia are points in California and are located on the lines of Southern Pacific Company. Betteravia is located on the line of the Santa

Maria Valley Railway in California. Portland and East Portland are the northern termini of the Southern Pacific lines north from California. St. Johns, Oregon, is located on the line of the Oregon-Washington Railroad & Navigation Company directly north of East Portland. Portland, East Portland and St. Johns are railroad stations within the corporate limits of the City of Portland, Oregon. This is an industrial map of Portland, Oregon, issued by the Port of Portland, showing the principal facilities, industries and rail lines. I am marking with a letter "a" the station on the Southern Pacific lines known as East Portland, with a letter "b" the station known as Portland, and with a letter "c" the station known as St. Johns.

(This map was admitted in evidence and marked plaintiff's Exhibit 1, and is attached to this bill of exceptions and made a part hereof.)

This is a map showing Southern Pacific Company's lines in the State of Oregon.

(This map was received in evidence and marked plaintiff's Exhibit 2, and is attached to this bill of exceptions and made a part hereof.)

Sugar from any of the points mentioned in the State of California, destined to St. Johns, would move northerly over the lines of Southern Pacific Company to East Portland, and there be delivered to the O.-W. R. & N. for movement to St. Johns. It could move into Portland station but it was generally moved through East

Portland. It can move into Portland and East Portland and be delivered to the O.-W. R. & N. It could move by Springfield Junction and the west side line to Portland and St. Johns, the rates being unrestricted as to routing south of Portland or East Portland. Springfield Junction is a point about one hundred and twenty-three or four miles south of Portland, just opposite Eugene. It may move into Portland on the west side of the Willamette River, there being a physical track connection. From a physical standpoint and from a traffic standpoint there is no reason why sugar cannot move either by the east side line or the west side line through Portland or East Portland to St. Johns. There is no way of moving sugar from California points to St. Johns by the lines of Southern Pacific Company and Oregon-Washington Railroad & Navigation Company except through Portland and East Portland.

Thereupon counsel for plaintiff inquired as follows:

Q. From a transportation standpoint would sugar moving to Portland and sugar moving to St. Johns move over the same line or route as far as Portland or East Portland?

MR. FARRENS: I object as calling for a conclusion of the witness of a physical fact of which the facts are in evidence or can be in evidence, and of which the court is as well or better qualified to judge than the witness.

THE COURT: I think he can answer the question.

Exception saved.

A. It would.

The witness testified further that there is a physical connection between the line of the Oregon-Washington Railroad & Navigation Company and Southern Pacific Company at Portland and East Portland. The tariffs in effect during the period of federal control covering transportation of sugar in carloads lots from originating points in California to St. Johns were Pacific Freight Tariff Bureau, Joint and Proportional Freight Tariff No. 1-B, F. W. Gomph, Agent, I. C. C. 55, effective September 15, 1912, and remained in effect until June 30, 1918. The subsequent issue was 1-C, and O.-W. R. & N. Co. Tariff, Local Freight Tariff No. 6-C, I. C. C. No. 312, which remained in effect until October 12, 1920. Item 815 of the tariff, a proportional commodity rate, northbound, applied on sugar from San Francisco, Marysville, Hamilton and other Group 1 points; from Salinas, Spreckles and Visalia to Portland and East Portland, and Betteravia, California, to Portland and East Portland. According to these tariffs the rate from San Francisco and Group 1 points to Portland and East Portland was thirteen cents per hundred; from Visalia, Spreckles and Salinas, twenty and one-half cents; from Betteravia, twenty-three cents. These figures were advanced 25% on June 25, 1918, by Director

General's Order No. 28 and Supplement 57 to this tariff.

(Thereupon the above mentioned tariff was admitted in evidence and marked plaintiff's Exhibit 3, and it was stipulated that plaintiff might have the right to withdraw the exhibit subject to call at any time.)

The rate from Portland and East Portland to St. Johns is carried in Oregon-Washington Railroad & Navigation Company's Local Freight Tariff No. 6-C, I. C. C. 312, effective October 25, 1914, and remained in effect until October 12, 1920. Item 60 of that tariff provided a rate on freight not otherwise specified, from Portland and East Portland to St. Johns, Oregon, of thirty-seven and one-half cents per ton, minimum weight per car of 20,000 pounds.

(This tariff was admitted in evidence and marked plaintiff's Exhibit 4, with stipulation that plaintiff might withdraw the same subject to call.)

The witness then testified that the routing carried on page 84 of the tariff provided that the rates would apply from Southern Pacific Company points in California to Oregon-Washington Railroad & Navigation Company points via Portland or East Portland.

From the beginning of federal control until June 25, 1918, the rates from the originating points mentioned in the complaint were carried in United States Railroad Administration, Southern Pacific Railroad Local Joint and Proportional Freight Tariff No. 729-B, I. C. C.

No. 3659, at page 159, Item 102-A. The rate from San Francisco was twenty cents per hundred pounds, Alvarado, twenty-three cents, Crockett, twenty-three cents, Hamilton, twenty-five cents, Visalia, twenty-seven and one-half cents, Salinas, twenty-three cents, Betteravia, twenty-five cents. These figures were increased 25% on June 25, 1918, making from San Francisco twenty-five cents, Alvarado, twenty-nine cents, Crockett, twenty-nine cents, Hamilton, thirty-one and one-half cents, Visalia, thirty-four and one-half cents, Salinas, twenty-nine cents, Betteravia, thirty-one and one-half cents.

(The last mentioned tariff was admitted in evidence and marked plaintiff's Exhibit 5, it being stipulated that the plaintiff might have the right to withdraw the same subject to call.)

Thereupon counsel for plaintiff made a statement as follows:

MR. WILSON: I would like to offer in evidence, if your Honor please, a portion of Rule 77 of Tariff Circular 18-A issued by the Interstate Commerce Commission, which I will read into the record. It is a portion of paragraph 77 of Interstate Commerce Circular No. 18-A: "When the Commission has issued an order granting a carrier authority to depart from provisions of the amended fourth section of the Act, and to charge higher rates or fares for shorter than for longer distances over the same line or route, the title page of each tariff issued and filed under such authority must bear

the following notation: 'This tariff contains rates (fares) that are higher for shorter distance than for longer distance over the same route. Such departure from the terms of the amended fourth Section of the Act to Regulate Commerce is permitted by authority of Interstate Commerce Commission Order F. S. No. . . of.... (date)'. When the Commission has issued an order granting to a carrier authority to depart from the provisions of the amended fourth section of the Act and to charge rates or fares higher than the aggregate of the intermediate rates or fares subject to the Act, the title page of each tariff issued and filed under such authority must bear the following notation: 'This tariff contains rates (or fares) that exceed the sums of the intermediate rates (or fares) subject to the act. Such departure from the terms of the amended fourth section of the Act to Regulate Commerce is permitted by authority of Interstate Commerce Commission Order F. S. No. of (date)'. Nothing in this rule may be construed as waiving any of the provisions of the amended fourth section of the Act to Regulate Commerce."

The witness then testified further that the title page of the original Tariff 1-B carried the following clause: "By authority of Rule 77 of the Interstate Commerce Commission, Tariff Circular No. 18-A, rates in individual items (making specific reference to Items Nos. 165 and 170) are not made applicable from or to, as the case may be, all intermediate points. Upon reasonable request therefor rates which would not exceed

those in effect from or to, as the case may be, more distant points, will, under authority granted by the Interstate Commerce Commission, be established from or to, as the case may be, any intermediate point hereunder, upon one day's notice to the Commission and to the public."

Item 815 of Tariff 1-B did not carry any reference to Items 165 or 170 as required by the clause carried on the title page of the tariff, and therefore had no reference to tariff charges on the joint and proportional rates from these originating points to Portland and East Portland. The tariff providing the rate from Portland and East Portland to St. Johns made no reference to paragraph 77 of the Interstate Commerce Tariff Circular No. 18-A.

CROSS-EXAMINATION.

Questions by Mr. Farrens:

The witness testified on cross-examination as follows: The station of Betteravia is located on the Santa Maria Valley Railroad. I do not know whether or not that railroad was under the control of the Director General of Railroads. The rate named from Betteravia to Portland was a joint through rate, and the Santa Maria Valley Railway was a party to the tariff. I do not know whether or not Southern Pacific Company owns the railroad from East Portland to Portland. From general knowledge the bridge over the Willamette River between Portland and East Portland is the prop-

erty of Southern Pacific Company and Oregon-Washington Railroad & Navigation Company jointly. The Northern Pacific Terminal Company operates the tracks on the West Side of the Steel Bridge over the Willamette River, upon which deliveries were made to my assignors in this case in West Portland, but I do not know who owns said tracks. I couldn't state the actual physical connection point between Southern Pacific Company's West Side branch line and Northern Pacific Terminal Company's lines in Portland, but the tariff applies that way. I am not concerned with whether or not the ordinances under which Southern Pacific Company operates its lines north of the Southern Pacific Company's Jefferson Street station permit the handling of freight. I am speaking from a tariff standpoint exclusively. As to the ownership of the property I know nothing. I do not know of any shipment of sugar ever having moved to St. Johns via the Southern Pacific Company's West Side lines. It would usually move via Southern Pacific to East Portland and thence to St. Johns over the lines of the Oregon-Washington Railroad & Navigation Company without crossing the Steel Bridge or the Willamette River into Portland, but it could move into Portland and thence back over the bridge to East Portland and thence to St. Johns. I do not know of any shipment of sugar being transported from the points of origin mentioned in my complaint to St. Johns during the period of federal control of railways.

If a shipment of sugar were transported from any

of the points of origin mentioned in my complaint to St. Johns via Portland it would be necessary for it to be hauled across the Steel Bridge over the Willamette River on to the trackage of Northern Pacific Terminal Company and then hauled back over the trackage of Northern Pacific Terminal Company, taken back across the Steel Bridge and the Willamette River and delivered to the Oregon-Washington Railroad & Navigation Company at the same point at which it would ordinarily be delivered without any such movement back and forth across the river and through the yards of the Northern Pacific Terminal Company, but I would consider Portland intermediate to St. Johns on the same line or on the same route because the tariff provides for routes which would permit of such movement. On page 84 it provides for routing to St. Johns either via Portland or East Portland.

If a shipment moved to Portland over the Southern Pacific lines from points of origin mentioned in my complaint and was diverted from Portland to St. Johns, there would have been a diversion or reconsignment charge made for that service. There would have been also a diversion charge on a shipment of sugar from the point of origin mentioned in my complaint through East Portland to St. Johns.

The Oregon-Washington Railroad & Navigation Company's Tariff 6-C, to which I have referred, was the switch tariff which named the rate from East Portland to St. Johns over the Oregon-Washington Rail-

road & Navigation Company's lines. Item 1 of this tariff 6-C, that refers to application to or from connecting lines, provides as follows:

"Terminal facilities provided by this company are intended and required for its own business, in view of which and the practice generally prevailing with respect to the use of terminal facilities, the rates named herein will not apply to and from team tracks on freight received from or delivered to connecting lines. Note: Freight will not be accepted at or delivered to warehouse or industrial tracks when for interchange with connecting carriers unless shipped by or consigned to parties permanently located on such warehouse or industrial tracks."

Item 60-G of Supplement 23 of Oregon-Washington Railroad & Navigation Company's Local Freight Tariff No. 6-C, I. C. C. 312, effective December 31, 1919, provides a switch charge between St. Johns and Portland of $7.50 a car and between St. Johns and East Portland of $5.00 per car, and this item carries two symbols, one of which indicates that these rates apply only on freight initiating with water carriers at St. Johns, Oregon, and when delivered to or received from railroad connections of the Oregon-Washington Railroad & Navigation Company at East Portland or Portland, Oregon, in line haul movement will not apply on carload freight originating at or destined for points situated on the Oregon-Washington Railroad & Navigation Company's line and its connections where line

haul can be performed by the Oregon-Washington Railroad & Navigation Company line. The same item carries the rate of thirty-seven and one-half cents per ton from Portland and East Portland without any such restrictions as apply to those two rates of $7.50 and $5.00 per car.

Southern Pacific Company's Tariff No. 729-B, I. C. C. No. 3659, was the tariff which named Southern Pacific Company local rates from points of origin mentioned in the complaint to East Portland.

The blanket supplement which was issued to all tariffs on June 24, 1918, the same being Supplement 5 to Tariff 729-B, carries reference to the Interstate Commerce Commission Fourth Section Order 7316 of May 27, 1918. This reference is on the title page of the supplement and reads as follows:

"This schedule contains rates that are departures from rates of the amended fourth section of the Act to Regulate Commerce under authority of Interstate Commerce Commission fourth section order 7316 of May 27, 1918." It also carries on the title page the following statement:

"The rates made effective in this schedule are initiated by the president of the United States through the Director General of the United States Railroad Administration and apply to interstate traffic only. This schedule is published and filed on one day's notice to the Interstate Commerce Commission under General

Order No. 28 of the Director General of the United States Railroad Administration. Dated May 25, 1918, and amended June 12, 1918."

The rates referred to in that supplement remained in effect until the termination of federal control.

Allen & Lewis Company, one of my assignors, was located on Front Street on the line of the United Railways. If any of the shipments received by Allen & Lewis were delivered to them by the United Railways at the point I have just mentioned there may have been a switching charge in addition to the rate they paid. I do not know whether or not the United Railways was under federal control.

Thereupon the witness testified as follows:

Q. Would you as a rate expert say that the movement of a carload of sugar from any of the points of origin named in your complaint to Allen & Lewis in West Portland, delivered over the lines of the United Railways, would be over the same route as the movement of a carload of sugar from the same point of origin to St. Johns?

A. The United Railways would not appear as a party to the through rate to St. Johns.

Q. It follows, then, doesn't it, that if any shipments mentioned in your complaint were delivered to your assignors by the United Railways, that those shipments did not move over the same route as shipments from California to St. Johns?

A. If, as you stated, that there was a switching charge over and above that, that would be a factor entirely independent of the rate to St. Johns,—

Q. I am not asking about the rate.

A. (Continuing)— or to East Portland.

Q. I am asking about the route. Answer my question about the route, please?

A. The United Railways would not be a party to the through rate to St. Johns.

Q. What about the route? What about the route?

A. Nor to the route.

STIPULATION OF COUNSEL

It is stipulated between counsel for the respective sides that all of the shipments shown in the exhibits to the complaint, with the amendments thereto, moved from the originating points to Portland, or East Portland, Oregon, and that the Director General received the amount of the charges as shown in the exhibit.

TESTIMONY OF FRANK KERR FOR PLAINTIFF.

FRANK KERR, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

I am secretary of Wadhams & Kerr Bros. Company, a corporation, engaged in the general wholesale

mercantile business. Wadhams & Kerr Bros. Company received the shipments evidenced by these freight bills. These shipments were received in Portland at 13th and Davis Streets upon tracks served by Northern Pacific Terminal Company. Wadhams & Kerr Bros. Company paid the freight on each of these shipments at the freight shed of Southern Pacific Company in the terminal ground.

(The package of freight bills to which this witness referred were admitted in evidence and marked plaintiff's Exhibit 6.)

Wadhams & Kerr Bros. Company executed two assignments of these claims on these various shipments to A. J. Parrington. They were signed by the president and secretary.

MR. WILSON: I offer them in evidence.

MR. FARRENS: Objected to on the ground that this assignment is not made out in the manner and subject to the requirements of Section 3477, of the Revised Statutes of the United States, designating the manner in which assignments of claims against the government must be made in order to be valid.

THE COURT: Admitted subject to your objection.

MR. FARRENS: Save an exception. (Exception allowed.)

(Thereupon these two assignments were marked respectively plaintiff's Exhibits 7 and 8, and are attached to this bill of exceptions and made a part hereof.)

CROSS EXAMINATION

Questions by Mr. Farrens.

Thereupon on cross examination the witness testified that the industrial trackage of Wadhams & Kerr Bros. Company was operated by the Northern Pacific Terminal Company, and that all switching charges were paid to the Northern Pacific Terminal Company.

MR. FARRENS: You were not afterwards reimbursed by any one else for any part of these freight charges?

THE COURT: That doesn't make any difference; if they paid it for themselves, suppose some one else did give them the money later.

MR. FARRENS: Save an exception.

MR. FARRENS: Now, during the period of federal control of railroads, the United States Food Administration limited the profit that you made on the sale of sugar in this city, didn't they?

A. Yes, sir.

Q. Can you say whether or not your company sold the shipments of sugar which are credited to your company in this complaint for a price which was equal to the maximum profit allowed?

MR. WILSON: I object to that as immaterial.

THE COURT: What has that to do with this case? The right to recover on this freight?

MR. FARRENS: If the court please, I don't know what view your Honor takes of the measure of damages in this case. But in the Intermountain Coal case the United States Supreme Court has indicated, and the Interstate Commerce Commission has always, without exception, ruled that a violation of the fourth section of the Interstate Commerce Commission Act didn't mean that the difference between any two sets of rates was the measure of damages. The plaintiff must prove that he was damaged, that he has personally suffered injury; not a mere technical question of subtracting one rate from the other is the measure of damages. This is not an overcharge case, this is a damage case.

THE COURT: I thought the courts held that the measure of damages is the difference in freight.

MR. WILSON: The Circuit Court of Appeals has, and your Honor held it; this International case referred to is a rebate case.

THE COURT: That is already settled so far as this district is concerned.

MR. FARRENS: Exception saved.

TESTIMONY OF H. A. CARR FOR PLAINTIFF

H. A. CARR, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

I am in the wholesale grocery business at 51 Front Street, Portland. Carr & Preston paid the transportation charges shown upon the shipping receipt which I hold in my hand.

(The shipping receipt was admitted in evidence and marked plaintiff's Exhibit 9.)

The witness then testified further that Carr & Preston had executed an assignment of its claim on said shipment to A. J. Parrington. Counsel for plaintiff offered said assignment in evidence, whereupon the following proceedings were had.

MR. FARRENS: I want to make the same objection, that it does not comply with Section 3477, Revised Statutes of the United States. May that be considered as made without repeating?

THE COURT: As to all assignments in that form.

MR. FARRENS: An exception as to each of them.

(An exception was duly allowed and thereupon the

assignment was admitted in evidence and marked plaintiff's Exhibit 10, and is attached to this bill of exceptions and made a part hereof,)

TESTIMONY OF H. C. FROST FOR PLAINTIFF.

H. C. FROST, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

I am connected with Starr Fruit Products Company, located at East First and Yamhill Streets, East Portland, and have a switch directly from Southern Pacific Company and O.-W. R. & N.

MR. WILSON: I hand you herewith a number of freight receipts, and ask you who paid the freight shown on these receipts?

A. The Starr Fruit Products Company.

MR. WILSON: I offer it in evidence.

MR. FARRENS: I desire at this time to object to the introduction of such of these freight bills in evidence as disclose on their face that payments were made more than two years prior to the date of the complaint filed in this case.

THE COURT: That on the theory barred by the statute?

MR. FARRENS: Yes, under the decision of the

United States Supreme Court in the case of K. C. & C. Ry. vs. Wolfe.

THE COURT: Put them in subject to the objection.

MR. FARRENS: Save an exception.

(The exception was duly allowed and the freight receipts were admitted in evidence and marked plaintiff's Exhibit 11.)

MR. WILSON: The Starr Fruit Products Company assigned its claim against the carrier to A. J. Parrington, the plaintiff in this case, didn't it?

A. Yes, sir.

MR. WILSON: And that is the assignment, is it?

A. Yes, sir.

MR. WILSON: Offered in evidence.

THE COURT: Admitted subject to the same objection and exception.

(Thereupon said assignment was admitted in evidence and marked plaintiff's Exhibit 12, and is attached to this bill of exceptions and made a part hereof.)

After this witness was excused the following proceedings were had:

MR. FARRENS: (Referring to all of plaintiff's

exhibits respecting freight charges paid more than two years prior to the commencement of action.) In order to make a record I would like to make the same motion based on the statute of limitations as made with respect to the exhibits offered by the witness, Mr. Kerr, of Wadhams & Kerr, namely, that those exhibits be stricken from the files in this case.

THE COURT: You will be entitled to urge that on the final argument as to all items that are barred by the statute.

TESTIMONY OF E. B. REYNOLDS FOR PLAINTIFF.

E. B. REYNOLDS, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

I am cashier of Lang & Company and have charge of the payment of moneys for freight on behalf of Lang & Company. Lang & Company paid the freight charges shown on this freight bill.

(The freight bill was then offered in evidence and marked plaintiff's Exhibit 13.)

Objection was raised by counsel for defendant that the face of the freight bill showed that it had been paid more than two years prior to the commencement of this action. The objection was overruled, exception was allowed and the freight bill was admitted in evidence and marked plaintiff's Exhibit 13.

The witness then identified the signature of I. Lang as president of Lang & Company to a certain assignment to A. J. Parrington of said company's claim on account of transportation charges paid as shown by said freight bill, plaintiff's Exhibit 13. Thereupon counsel for defendant objected upon the ground that said attempted assignment was invalidated by the provisions of Section 3477 of the Revised Statutes of the United States, which objection was overruled, exception allowed and said assignment was admitted in evidence and marked plaintiff's Exhibit 14, and is attached to this bill of exceptions and made a part hereof.

CROSS EXAMINATION

Questions by Mr. Farrens.

Q. Lang & Company bought this sugar for the purpose of re-sale, didn't they, rather than for use in manufacturing purposes?

A. Yes, sir.

Q. Do you know whether or not the price of sugar was limited by the United States Food Administration in such a manner that a dealer could only secure a certain profit during the period of federal control?

A. I don't know.

Q. And you don't know whether or not that profit was secured by your company then?

A. I don't know.

TESTIMONY OF F. A. LEHMAN FOR PLAINTIFF.

F. A. LEHMAN, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

I am traffic man for Mason, Ehrman & Company. Freight charges are approved by me before being paid by that company.

MR. WILSON: Now, I will hand you herewith some paid freight bills, some of which are shown here by copies and some by originals, and will ask you if you know who paid the freight charges represented by those expense bills?

A. Mason, Ehrman & Company.

MR. WILSON: I offer them in evidence; some of these are copies of which I have spoken to Mr. Farrens, and he has agreed that copies may be used.

MR. FARRENS: No objection to their being other than originals, but I do wish the same objection on the ground of the statute of limitations.

(Thereupon the court overruled the objection, allowed an exception, and the freight bills were admitted in evidence and marked plaintiff's Exhibit 15.)

Thereupon the witness identified the signature of S. Mason Ehrman, secretary of Mason, Ehrman & Company, to a certain assignment of that company's claims

to A. J. Parrington; counsel for plaintiff offered said assignment in evidence; counsel for defendant objected thereto on the ground that said assignment was invalidated by the provisions of Section 3477 of the Revised Statutes of the United States; the court overruled the objection, allowed an exception and the assignment was admitted in evidence and marked plaintiff's Exhibit 16, and is atached to this bill of exceptions and made a part hereof.

CROSS EXAMINATION.

Questions by Mr. Farrens.

MR. FARRENS: Do you know whether or not Mason, Ehrman & Company, Inc., executed an assignment in favor of the Pacific Adjustment Company, a California corporation?

THE COURT: He said he didn't have anything to do with the assignments; he is the traffic manager.

MR. FARRENS: He is the traffic manager, and takes care of the collection of these rates, and I thought he probably might know.

MR. FARRENS: Would you be able to say whether or not that is a photostatic copy of what purports to be an assignment and what purports to be signed by Mason Ehrman? Can you say whether or not that is the signature of S. Mason Ehrman?

A. That is the signature of S. Mason Ehrman, yes.

MR. WILSON: Entirely subsequent to that as-

signment, so I say it is absolutely immaterial here.

MR. FARRENS: Offered in evidence.

MR. WILSON: Objected to as immaterial and irrelevant, subsequent to the assignment here involved.

MR. FARRENS: This exhibit (16) is an assignment for collection only, whereas this exhibit is an absolute assignment from Mason, Ehrman & Company to the Pacific Adjustment Company of all claims it has against the United States Railroad Administration.

THE COURT: Have you set up that in defense?

MR. FARRENS: No, but I think it goes to the question of whether or not this company has assigned.

THE COURT: You deny it in the answer?

MR. FARRENS: Yes.

THE COURT: Put it in the record.

(The document was admitted in evidence and marked defendant's Exhibit A, and is attached to this bill of exceptions and made a part hereof.)

TESTIMONY OF F. P. KENSINGER FOR PLAINTIFF.

F. P. KENSINGER, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

I am traffic manager of Tru-Blu Biscuit Company. I know from the records of that company that these freight bills were paid by Tru-Blu Biscuit Company.

MR. WILSON: I offer these in evidence.

MR. FARRENS: One of the freight bills is subject to the objection concerning the statute of limitations.

(Thereupon the court overruled said objection, allowed an exception, and the freight bills were admitted in evidence and marked plaintiff's Exhibit 17.)

Thereupon the witness identified the execution by Tru-Blu Biscuit Company of an assignment of said company's claims to A. J. Parrington, and counsel for plaintiff offered said assignment in evidence; counsel for defendant objected upon the ground that said assignment was invalidated by Section 3477 of the Revised Statutes of the United States, which objection the court overruled, allowed the exception, and said assignment was admitted in evidence and marked plaintiff's Exhibit 18, and is attached to this bill of exceptions and made a part hereof.

TESTIMONY OF F. A. SMITH FOR PLAINTIFF.

F. A. SMITH, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

I am traffic manager for Wadhams & Company, and approve freight bills before they are paid by that company. These two freight bills were paid by Wadhams & Company.

Thereupon counsel for plaintiff offered said freight bills in evidence; counsel for defendant objected to the admission of one of said freight bills because it appeared

upon the face of said bill that the same was paid more than two years prior to the commencement of this action; the court overruled the objection, allowed an exception, and the freight bills were received in evidence and marked plaintiff's Exhibit 19.

Thereupon the witness identified the signature of Mr. Hahn, the manager of Wadhams & Company, to an assignment of said company's claims to A. J. Parrington; counsel for plaintiff offered same in evidence; counsel for defendant objected thereto on the ground that said assignment was invalidated by Section 3477 of the Revised Statutes of the United States; the court overruled the objection, allowed an exception, and said assignment was received in evidence and marked plaintiff's Exhibit 20, and is attached to this bill of exceptions and made a part hereof.

CROSS EXAMINATION

Questions by Mr. Farrens.

MR. FARRENS: I hand you what purports to be a photostatic copy of an assignment executed by Wadhams & Company in favor of the Pacific Adjustmen Company, a California corporation, covering all claims which Wadhams & Company had against the United States Railroad Administration. By whom is the name Wadhams & Company signed?

A. By Henry Hahn, president of the company.

Q. Are you familiar with his signature?

A. I am.

Q. Would you say that was a photostatic copy of his signature?

A. Yes, I would.

(Thereupon said instrument was received in evidence and marked defendant's Exhibit B, and is attached to this bill of exceptions and made a part hereof.)

TESTIMONY OF S. C. MORRIS FOR PLAINTIFF.

S. C. MORRIS, called as a witness for plaintiff, being first duly sworn, testified as follows:

I am Traffic Manager for Allen & Lewis. Allen & Lewis paid the charges on these four freight bills.

Thereupon counsel for plaintiff offered said freight bills in evidence; counsel for defendant objected to the admission of such of said bills as showed on their face that they had been paid more than two years prior to the commencement of this action; the court overruled the objection, allowed an exception, and the freight bills were admitted in evidence and marked plaintiff's Exhibit 21.

Thereupon the witness identifed, and counsel for plaintiff offered in evidence, an assignment executed by Allen & Lewis to A. J. Parrington, covering the claims of said Allen & Lewis. Counsel for defendant objected to the admission of said document in evidence on the ground that same was invalidated by the pro-

visions of Section 3477 of the Revised Statutes of the United States; the court overruled the objection, allowed an exception, and the document was admitted in evidence and marked plaintiff's Exhibit 22, and is attached to this bill of exceptions and made a part hereof.

CROSS-EXAMINATION.

Thereupon the witness testified further that Allen & Lewis received delivery of its carloads of sugar on the line of United Railways Company during the period of federal control.

RE-DIRECT EXAMINATION.

Questions by Mr. Wilson:

MR. WILSON: When you get United Railways delivery you have to pay an additional switching charge, don't you?

A. We did.

Q. And no part of that switching charge is covered by—no part of the charges for that delivery by the United Railways is covered by these shipping receipts?

A. No, sir.

Q. And that charge is not collected by the Southern Pacific Company or the Director General?

A. It is collected by the Southern Pacific.

Q. So that any charges you paid for that delivery

by the United Railways is in addition to the charges in the exhibit offered?

A. Yes.

Mr. FARRENS: I move to strike both of the last two answers. I tried both times to object before the witness answered, on the ground that they are irrelevant and immaterial, whether or not there were additional charges over and above the charges mentioned in plaintiff's complaint, as to those shipments moving to Allen & Lewis. The point is that shipments moving to Allen & Lewis Company on the United Railways are not the same routing.

THE COURT: Let the evidence stand as it is.

To this ruling of the court counsel for defendant requested and was allowed an exception.

TESTIMONY OF W. A. BAKER FOR PLAINTIFF.

W. A. BAKER, called as a witness for plaintiff, being first duly sworn, testified as follows:

I am Traffic Manager for Meier & Frank Company. Meier & Frank Company paid the freight shown on these two receipted bills.

Thereupon counsel for plaintiff offered said freight bills in evidence, to which offer counsel for defendant objected on the ground that it appeared on the face of said bills that the same were paid more than two years

prior to the commencement of this action; the court overruled said objection, allowed an exception and the documents were admitted in evidence and marked plaintiff's Exhibit 23.

TESTIMONY OF A. J. PARRINGTON ON HIS OWN BEHALF.

(Recalled.)

A. J. PARRINGTON, recalled as a witness on his own behalf, testified as follows:

Oregon-Washington Railroad & Navigation Company and Southern Pacific Company are both named as parties on the title page to the tariff Pacific Freight Tariff Bureau, Joint & Proportional Freight Tariff 1-B, F. W. Gomph, I. C. C. 110. This tariff shows an index of points from which northbound rates apply, which includes all of the sugar shipping points at issue in this case, and it also carries an index of points to which northbound rates apply. St. Johns, Oregon, is shown in that list of northbound destinations as taking Group 7 rate. There are a number of through commodity rates published from various California points to destinations named in the tariff. In Item 180, on page 57, of this tariff, there is prescribed a basis for making through rates except where through rates are provided, and it reads:

"Between San Francisco, Stockton and other points on the lines of Atchison, Topeka & Santa Fe Coast

Lines, shown in Items 185 to 970, inclusive, pages 57 to 72, and points on the Oregon-Washington Railroad & Navigation Company, the basis is set forth as follows: Add to the proportional rates shown in Items 185 to 970, inclusive, on pages 57 to 72, inclusive, the rates from each to Portland or East Portland, Oregon, published in the tariffs referred to below, supplements thereto, or re-issues thereof."

O.-W. R. & N. Co. Tariff No. 6, I. C. C. No. 55, and reissues thereof and supplements thereto, is included in this list. The sugar item in this tariff is No. 815. In making rates on sugar under this tariff you use the joint and proportional rate to Portland, plus the rate given in the tariff referred to as 6 or the issues thereof. Tariff No. 6 and the reissues thereof provide a switching rate from Portland or East Portland to St. Johns. The switching rate on sugar from Portland and East Jortland to St. Johns, under Tariff 6-C, was thirty-seven and one-half cents per ton of 2000 pounds, minimum carload 20 tons. The same item, 60-G, in this switch tariff, carries a rate between St. Johns and Portland of $7.50 per car, and between St. Johns and East Portland of $5.00 per car, subject, however, to a provision as follows: "Applies only on freight interchanged with water carriers at St. Johns, Oregon, and when delivered to or received from railroad connection of O.-W. R. & N. at East Portland or at Portland, Oregon, in line haul movement."

The witness then gave testimony tending to prove

that if the ruling last above quoted prevented the switching rates of $7.50 and $5.00 per car from being applicable between Portland and East Portland and St. Johns, the switch tariff nevertheless carries a thirty-seven and one-half cent per ton rate, which was not so limited, and thereupon the following proceedings were had:

MR. FARRENS: Objected to because counsel is now trying to prove a different measure of damages or different rate than alleged in the complaint.

MR. WILSON: No, I am not. I would like your Honor to take a look at this tariff.

MR. FARRENS: My objection has nothing to do with the truth or falsity of the statement as just made, but I call your attention to the fact that the 6th paragraph of the complaint alleges a measure of damages and makes a statement as to the rates in existence from December 31, 1919, to the end of federal control, says that by Supplement No. 27 of the O.-W. R. & N. Co. Local Freight Tariff No. 6-C, I. C. C. 312, Item 60-G, a certain rate was in effect; a rate of $7.50 per car; and further on in his complaint he alleges that this is the measure of his damages, the difference betweeen what was paid and that proportional rate plus $7.50 per car. Now, I contend that he is trying to introduce evidence to support an allegation which is in variance with his complaint, and which would tend to support a different measure of damages than that which he has alleged.

MR. WILSON: If there is any doubt in your Honor's mind, the evidence having been introduced without objection, I would like leave to amend the complaint to conform with the proof.

MR. FARRENS: As far as the introduction of the evidence without objection, the type of counsel's question was such as to give me no warning what he was intending to elicit from the witness. Had I known, I would have objected and I move now to strike from the record.

THE COURT: Let the record remain.

MR. WILSON: As as a matter of fact, I don't concede. I am saying that according to his interpretation of that paragraph; I don't give it the same interpretation he does. I say it does apply. He is wanting, your Honor, to make it apply in only one instance, and I say the case is susceptible of application in two instances, to wit, both when the shipment is received from water carrier and also when it is in connection with line haul of connecting carrier, because otherwise they wouldn't put in the clause "when" after the word "and" if it were to be in one instance only. Now, it says when received from ship and when it is in connection with line haul. But I say if there is any doubt in your Honor's mind that the 37½ cents per ton still applies instead of the $7.50 per car applying prior to the issuance of this tariff.

MR. FARRENS: If the court please, in those in-

stances where evidence is permitted to go in, either in counsel's case in chief or in my case in chief later on, may it be always understood where objection has been made, that we have asked for an exception, and that it has been granted.

THE COURT: That may be understood, yes. The case is being tried before the court and I don't wish the testimony stricken out.

It was then stipulated between counsel that the proclamation of the president taking over the control and operation of the railroad systems, 40 Statutes at Large, page 1723, might be considered in evidence, and the witness further testified that the Director General adopted and continued in effect the tariffs existing on the date of commencement of federal control.

CROSS-EXAMINATION.

The witness testified that the rules limiting the application of the switching rates between Portland, East Portland and St. Johns, named in Switching Tariff 6-Series, were invalid because they were not also set forth in Tariff 1-B, which named the proportional rate from points of origin in California to Portland and East Portland. However, if Tariff 6-Series did not name a rate to St. Johns at all the combination of the two tariffs would not have created a rate from points of origin to St. Johns.

STIPULATION.

MR. FARRENS: Mr. Wilson and I mutually de-

sire to shorten the record by stipulation of facts, to the effect that during the period of federal control of railroads, the bridge across the Willamette River at Portland, commonly known as the Steel Bridge, connecting the line of the Southern Pacific Company and the O.-W. R. & N. Co. on the east side of the Willamette River with the Northern Pacific Terminal Line on the west side of said river, was owned in common by the O.-W. R. & Co., and and Oregon & California Railroad Company, and that the Southern Pacific Company, by virtue of a lease of the Oregon-California Railroad Company's property, had operating rights over said bridge, and was the lessee of the Oregon-California Railroad Company's rights therein; that all lines of railroad in the immediate vicinity of the Portland station and west of the west end of the said steel railroad bridge are owned by the Northern Pacific Terminal Company; that all the shipments of sugar mentioned in plaintiff's complaint which were destined to Portland station, or what we have referred to as West Portland, were handled by and moved over the said bridge and said tracks of the Northern Pacific Terminal Company; that the Southern Pacific Company owned twenty per cent of the stock of the Northern Pacific Terminal Company; that the O.-W. R. & N. Co. owned forty per cent of the stock of the Northern Pacific Terminal Company; that the Director General was in possession of and operating the line of the Southern Pacific Company, the lines of the O.-W. R. & N. Co. and the lines of the Northern Pacific Terminal Company during the period

of federal control.

MR. WILSON: And also that the Oregon-California, and the Southern Pacific Company as lessee, has an agreement of lease of all facilities of the Northern Pacific Terminal Company, and it and its predecessors in interest had had such since 1882.

MR. FARRENS: I think that is right, yes, and I think you will agree further that the cars hauled for the Southern Pacific Company, for example, to a delivery on the Northern Pacific Terminal Company line, by the Northern Pacific Terminal Company are paid for to the Northern Pacific Terminal Company on a wheelage basis, comparing the amount of total business so hauled by the Northern Pacific Terminal Company over the period of a year for such basis.

MR. WILSON: No question about it. All of these lines, the Northern Pacific Railway Company, the Oregon-Washington Railroad & Navigation Company, and the Southern Pacific Company and its lessor, the Oregon-California Railroad Company have a joint lease of all of the property, and for operating convenience they operate it through the Terminal Company and pay for the service which they get for their particular property strictly on a wheelage basis.

MR. FARRENS: It is stiuplated between counsel that various Interstate Commerce Commission—I mean the regularly published decisions may be referred to in

argument and briefs with like effect as if introduced in evidence in this case.

MR. WILSON: In other words, the published volumes may be considered in evidence if any one wants to consider them. In connection with that stipulation we have just made, I have alleged in our complaint that the Southern Pacific Company owned all the lines of railroad from these points in California to Portland and East Portland. He has admitted that but in view of our stipulation I want it understood that, if it is deemed necessary the complaint may be considered amended to permit our stipulation referring to ownership and lease of the properties.

MR. FARRENS: That is agreeable.

TESTIMONY OF JAMES G. WILSON FOR PLAINTIFF.

JAMES G. WILSON, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

The witness having announced that his testimony would be without interrogation and that its tendency would be to prove the sum which in his opinion was proper to be allowed as attorney's fees in this case. Counsel for defendant objected to the admission of any evidence by or through said witness upon the ground that attorney's fees were not allowed against the Director General of Railroads or the United States government in this case.

The court overruled the objection, allowed an exception, and thereupon the witness testified that in his opinion the sum of $1200.00 was a reasonable attorney's fee to be allowed the plaintiff in this case.

CROSS-EXAMINATION

The witness testified that he had made two arguments in court, one of which was on a demurrer to plaintiff's complaint and the other on demurrer to defendant's answer. Neither of these arguments consumed more than thirty minutes.

STIPULATION OF COUNSEL.

MR. FARRENS: I had an understanding with counsel that he will admit the verity of the signature upon the document which purports to be a photostatic copy of the assignment of Lang & Company to the Pacific Adjustment Company of all its claims against the Director General of Railroads. I understand counsel does not stipulate it may be received.

Counsel for defendant then offered said document in evidence and counsel for plaintiff objected upon the ground that the date of said assignment was subsequent to the date of the assignment from Lang & Company to plaintiff, and that said document did not purport to assign anything except what the assignor had at the time of the execution of the assignment.

The court overruled the objection, allowed an exception and the document was admitted in evidence and

marked defendant's Exhibit C, and is attached to this bill of exceptions and made a part hereof.

STIPULATIONS.

MR. FARRENS: I also have an understanding with counsel for plaintiff that the franchise ordinances of the City of Portland granting the Oregon-California Railroad Company, and running to the Southern Pacific Company as lessee of the Oregon-California Railroad Company, under which the Southern Pacific Lines on Fourth Street were operated during the period of federal control contain this limit and provision: "That said railway tracks on said Fourth Street shall not be used or operated for the transportation of freight upon them except for the transportation of material for the construction or repair of said tracks and appurtenances, and for the construction and maintenance of the paving required by this ordinance, but shall be used for the transportation of passengers, mail, baggage and express thereon, under the limits hereinafter specified."

MR. WILSON: I agree that the ordinances contain that provision under which you are now operating.

MR. FARRENS: And under which we were operating during the period of federal control?

MR. WILSON: Under which the line was operated during the period of federal control.

MR. FARRENS: At this time, I desire to offer in evidence a certified copy of letter from John Barton Payne, General Counsel of the United States Railroad

Administration, addressed under date of June 25, 1918, to C. W. Gates, President of the Santa Maria Valley Railroad, advising him that the Santa Maria Valley Railroad was not under federal control.

MR. WILSON: I object as irrelevant and immaterial to the controversy on the ground that whether the line was under federal control or not, it governed the rates from Betteravia to the points of Portland and St. Johns, the Santa Maria Valley Railroad Company being a party to the tariff, and it is immaterial whether they were under federal control or not.

MR. FARRENS: I think it apparent that this document proves a defect in the parties defendant in this case.

THE COURT: Put it in.

MR. FARRENS: I would like to have considered as a part of this exhibit and to bear the same number, an agreement entered into between the Santa Maria Valley Railroad Company and the Director General, releasing the Director General from claims to the effect that this road was under federal control, and waiving all benefits of federal control, and a copy of the Board of Directors' resolution authorizing execution of that document in the name of the Santa Maria Valley Railroad Company.

(Thereupon said documents were admitted in evidence, marked defendant's Exhibit D, and are attached

to this bill of exceptions and made a part hereof.)

MR. FARRENS: I desire to offer a similar document relating to the United Railways.

MR. WILSON: I object as irrelevant and immaterial. There are no freight charges involved in this case for any transportation of any freight over the lines of the United Railways.

MR. FARRENS: Objection that counsel has made does not apply with the force in this instance that it did in the previous instance, for the reason, as your Honor will remember, it appeared in plaintiff's case in chief that delivery of goods to Allen & Lewis was accomplished over the lines of the United Railways.

(Thereupon said document was admitted in evidence, marked defendant's Exhibit E, and is attached to this bill of exceptions and made a part hereof.)

MR. FARRENS: Will counsel agree that General Order No. 28 may be referred to as if in evidence?

MR. WILSON: Yes.

MR. FARRENS: I wish to offer in evidence Interstate Commerce Commission Fourth Section Order No. 7316. This document bears underscoring which was not in the original and it has no relation to the purpose for which it is offered here. It is not a certified copy but I understand that my arrangements with counsel are such that he will not object to it for that reason.

MR. WILSON: I object as irrelevant and immaterial, not in response to any issues in this case. Your Honor has already sustained the demurrer to their allegation setting up this identical document and therefore it is out of the case.

THE COURT: Is that the order of the Interstate Commerce Commission?

MR. WILSON: Order of the Interstate Commerce Commission; when the rates were increased the Interstate Commerce Commission made an order permitting them to violate the long and short haul clause as far as necessary to put in the increased rates, and your Honor sustained the demurrer to the allegation.

THE COURT: It may go in as part of the record for future reference.

(Thereupon said copy of said fourth section order No. 7316 was admitted in evidence and marked defendant's Exhibit F, and is attached to this bill of exceptions and made a part hereof.)

MR. FARRENS: I also wish to introduce copy of Interstate Commerce Commission's Order No. 7601. This offer is made because this latter order explains and interprets the original order No. 7316.

MR. WILSON: Objected to on the same ground.

THE COURT: Admitted under the same ruling.

(Thereupon copy of said order No. 7601 was admitted in evidence and marked defendant's Exhibit G, and is attached to this bill of exceptions and made a part hereof.)

TESTIMONY OF SAMUEL MURRAY FOR DEFENDANT

SAMUEL MURRAY, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

I am Assistant Chief Engineer of the Union Pacific System, and have been in the Engineering Department of the Union Pacific and Southern Pacific twenty-two years. I was connected with the Engineering Department of the O.-W. R. & N. Co.—Union Pacific System— when the Steel Bridge across the Willamette River was built. The cost of this bridge, exclusive of real estate, signals, trackage or switch, was $909,455.00. If freight from California points was transported to St. Johns via Portland it would have to be hauled across the bridge from East Portland to Portland and then be hauled back across the bridge from Portland to East Portland before proceeding to St. Johns.

TESTIMONY OF J. N. HARNEY FOR DEFENDANT

J. N. Harney, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

During the period of federal control of railroads I was agent for O.-W. R. & N. Co. at St. Johns, and the records of that station were in my possession and under my control. During the period of federal control there were no carload shipments of sugar received at the St. Johns station.

CROSS EXAMINATION

Questions by Mr. Wilson.

Over the objection of counsel for defendant to the effect that testimony concerning shipments of sugar moving subsequent to the period of federal control was irrelevant, and with exception allowed by the court, the witness gave testimony tending to prove that on August 10, 1921, a carload shipment of sugar was received at St. Johns and freight charges collected thereon on the basis of the proportional rate to Portland plus the switching charge to St. Johns.

REDIRECT EXAMINATION

Questions by Mr. Farrens.

The witness testified that said shipment of August 10, 1921, was delivered on the tracks of the Portland Woolen Mills near St. Johns because the consignee had no industrial track at that station, and because there were no team tracks available at St. Johns. The witness further testified that the parties who accepted delivery of said shipment stated that this shipment of sugar would be hauled back to Portland by truck. The witness further testified that it was his recollection that this particular shipment of sugar moved from points of origin in California to St. Johns through East Portland instead of through Portland.

Thereupon the following proceedings were had:

MR. FARRENS: I have an understanding with counsel that I may introduce letter from Mason, Ehr-

man & Company.

MR. WILSON: That is I admit they were signed by Mason, Ehrman & Company without proof of signature. I want to object to the matter.

MR. FARRENS: With that admission, I desire to offer in evidence letter from Mason, Ehrman & Company to Mr. Root who is secretary agents, specifying the points to which cars consigned to them should be delivered.

MR. WILSON: It being understood that Mason, Ehrman & Company's spur is on the Northern Pacific Terminal Company's track.

MR. FARRENS: I think it is; I will put on a witness to prove where that is.

(Thereupon said document was admitted in evidence, marked defendant's Exhibit J, and is attached to this bill of exceptions and made a part hereof.)

MR. FARRENS: Also a letter from Allen & Lewis to Mr. Root, under date of December 17, 1918.

(Thereupon said document was admitted in evidence, marked defendant's Exhibit K, and is attached to this bill of exceptions and made a part hereof.)

MR. WILSON: I make the same objection—

MR. FARRENS: Also Wadhams & Kerr Bros.

(Thereupon said document was admitted in evidence, marked defendant's Exhibit L, and is attached to this bill of exceptions and made a part hereof.)

MR. WILSON: I object to them all as immaterial and irrelevant; they simply refer to giving orders with reference to delivery of cars.

MR. FARRENS: My purpose in offering the proof is to show where these carload shipments were actually delivered and that they didn't move over the same lines as if to St. Johns. I have an understanding with counsel if these letters are received in evidence I may withdraw the originals and substitute copies.

TESTIMONY OF JOHN MIEBUS FOR DEFENDANT

JOHN MIEBUS, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Counsel for plaintiff objected to all testimony to be offered by this witness on the ground that the same was irrelevant and immaterial, which objection was overruled by the court and exception allowed.

During the period of federal control of railroads I was General Yard Master of the Northern Pacific Terminal Company of Oregon. During the period of federal control of railroads a carload of sugar from California destined for delivery to Allen & Lewis would have been carried by Northern Pacific Terminal Company from the west bank of the Willamette River, a

distance of approximately 1500 feet, where it would have been delivered to the United Railways Company, which latter company would have transported it to Front and Hoyt Streets, which is on the west side of the Willamette River in Portland, Oregon.

During the period of federal control of railroads a carload shipment of sugar from California consigned to Mason, Ehrman & Company would have been transported from the west bank of the Willamette River to 15th and Overton Streets by Northern Pacific Terminal Company a distance of a little less than a mile.

During the period of federal control of railroads a carload shipment of sugar from California to Wadham & Kerr Bros. Company would have been transported by Northern Pacific Terminal Company from the west bank of the Willamette River over tracks of Northern Pacific Terminal Company to 13th and Davis Streets, a distance of a little in excess of a mile.

Lang & Company's deliveries are made by Northern Pacific Terminal Company on its trackage on the west side of the Willamette River.

Wadhams & Company's deliveries are made by Northern Pacific Terminal Company on its trackage on the west side of the Willamette River.

Meier & Frank Company's deliveries are made by Northern Pacific Terminal Company on its trackage on the west side of the Willamette River.

CROSS EXAMINATION

Questions by Mr. Wilson.

Loaded freight cars intended for ultimate delivery by Northern Pacific Terminal Company are hauled by Southern Pacific Company from East Portland across the Steel Bridge over the Willamette River to an interchange track just beyond the west bridge head, from which track such cars are taken by Northern Pacific Terminal Company and delivered to their respective consignees at industry tracks or team tracks.

TESTIMONY OF J. H. MULCHAY FOR DEFENDANT

J. H. MULCHAY, a witness called on behalf of defendant, being first duly sworn, testified as follows:

I am General Freight Agent for Southern Pacific Company in charge of freight traffic matters on its lines in Oregon, with headquarters at Portland. My entire experience over a period of thirty-two years has been in the Freight Traffic Department of the O.-W. R. & N. and the Southern Pacific Company, both in Portland and in San Francisco. For twenty-five years I have been directly connected with rate and traffic matters and have held all positions from office boy up to my present position, including the positions of Chief of Tariff and Rate Bureau, Assistant Chief Clerk, Chief Clerk, District Freight Agent, Assistant General Freight Agent and General Freight Agent.

MR. WILSON: I will admit Mr. Mulchay's qualifications as a tariff expert, familiar with tariffs, rate making, everything connected with the department.

Thereupon the witness testified further that during the period of federal control Southern Pacific local rates from points of origin mentioned in plaintiff's complaint to East Portland and Portland were carried in Southern Pacific Local Tariff 729-B, I. C. C. 3659, effective October 15, 1915, and in the succeeding Tariff 729-C I. C. C. 4092, effective December 6, 1919.

From the beginning of Federal control until June 24, 1918, the rates between the various points of origin mentioned in plaintiff's complaint and East Portland and Portland were as follows: From San Francisco twenty cents, from Alvarado twenty-three cents, from Crockett twenty-three cents, from Hamilton twenty-five cents, from Visalia twenty-seven and one-half cents, from Salinas twenty-three cents, from Betteravia twenty-five cents.

From June 25, 1918, until the end of federal control, the same rates remained in effect, plus a general increase of 25% authorized by Director General's Order No. 28, making the rates as follows: From San Francisco twenty-five cents, from Alvarado twenty-nine cents, from Crockett twenty-nine cents, from Hamilton, thirty-one and one-half cents, from Visalia thirty-four and one-half cents, from Salinas twenty-nine cents, from Betteravia thirty-one and one-half cents.

The above cited rates were the rates charged on the shipments mentioned in plaintiff's complaint.

These Tariffs Nos. 729-B and 729-C named rates to intermediate points on the Southern Pacific line between the points of origin mentioned in plaintiff's complaint and Portland or East Portland that were higher than the rate to Portland or East Portland, but these departures from the fourth section of the Act to Regulate Commerce were protected by I. C. C. Fourth Section Order No. 4650, and later by I. C. C. Fourth Section Order No. 7316.

Pacific Freight Tariff Bureau Tariffs Nos. 1-B and 1-C and 1-D, which were filed with the Interstate Commerce Commission by F. W. Gomph, the publishing agent, under his I. C. C. Nos. 110, 340 and 421, named a proportional rate which from the beginning of federal control to and including June 24, 1918, was as follows: From San Francisco thirteen cents for 100 pounds, from Alvarado, Crockett and Hamilton, thirteen cents, from Visalia and Salinas twenty-one cents, and from Betteravia twenty-three cents. On June 25, 1918, these proportional rates were increased 25% under Director General's Order No. 28, making the rates as follows: From San Francisco, Crockett, Alvarado and Hamilton, sixteen and one-half cents, from Visalia and Salinas twenty-five cents, from Betteravia twenty-nine cents.

During the period of federal control shipments of sugar did move under these proportional rates from points of origin mentioned in plaintiff's complaint to

points on the line of O.-W. R. & N. Co. beyond St. Johns in Oregon, Washington and Idaho. Such shipments moved from points of origin over Southern Pacific Company's lines to East Portland where the cars and waybills were turned over to the O.-W. R. & N. Co. for movement to final destination. However, in the case of a shipment originating at Betteravia, which is on the Santa Maria Valley Railway about five miles east of Guadaloupe, California, same was hauled from Betteravia to Guadaloupe over the line of the Santa Maria Valley Railroad, which was not under federal control except for a very short period.

During the period of federal control shipments moving on these proportional rates from California to points on the lines of the Northern Pacific Railway Company would have been hauled over the line of Southern Pacific Company to Portland, where the shipments would be turned over to the Northern Pacific Terminal Company, which company would transport the cars and make delivery to the Northern Pacific Railway Company on the west side of the Willamette River.

MR. FARRENS: Mr. Mulchay, as a traffic expert, would you or wouldn't you, say that the haul from California points mentioned in plaintiff's complaint to West Portland was over the same line or routed in the same direction and included within the haul from the said California points to St. Johns?

MR. WILSON: I object as immaterial, irrelevant and not a proper subject for opinion evidence.

MR. FARRENS: That is the question counsel asked his own traffic expert.

THE COURT: He can answer.

A. No.

MR. FARRENS: As a traffic expert, state whether or not the haul of a shipment to Allen & Lewis, such as mentioned in plaintiff's complaint, moving by Southern Pacific lines, Northern Pacific Terminal lines and United Railway lines, was over the same line or routed in the same direction, and included within the haul from said California points to St. Johns?

A. No, sir.

Q. Now, state your reasons to the court for making these last two answers.

MR. WILSON: I make my objection to all that.

THE COURT: I understand.

A. Well, there is no question but what there is a side line haul. The traffic to St. Johns moving via Southern Pacific lines and O.W. R. & N. lines moves directly north, while shipments going to Portland, west side, diverge from the East Portland terminals of the Southern Pacific Company, cross the bridge at the Willamette River to the west bank, where the cars are turned over to the Northern Pacific Terminal Company, and in the case of the Allen & Lewis shipment it was in turn delivered to the United Railways to be delivered at their warehouse on Front Street between

Couch and Davis. They go west, go south and go east again.

MR. FARRENS: Mr. Mulchay, would the line of the United Railways be included in any haul from Southern Pacific points to St. Johns?

A. No, sir.

Q. And would your answer apply to that question even if under the theory of counsel for plaintiff West Portland was also in route to St. Johns? Do you get my idea? Counsel takes the position that West Portland as well as East Portland is on the route to St. Johns. Now, I say as to this Allen & Lewis shipment, even if he is correct, would the route of the United Railways be included in the run from Southern Pacific points to Portland and St. Johns?

A. No, would be no possible way for the United Railways to handle shipments under the through rate.

Q. At that point I want to ask you to state whether or not the Northern Pacific Terminal Company was recognized in the tariffs then in effect as a separate line or separate entry?

A. Recognized as a separate railroad.

Q. Please state your authority for that?

A. Southern Pacific Company's—or Southern Pacific Terminal Tariff No. 230-Series provided "that except as may be otherwise specifically provided carload rates named in tariffs of the Southern Pacific Company lawfully on file with the Interstate Commerce

Commission and the Public Service Commission of Oregon apply to and from regular transfer, team or sidetracks of this company within yard limits at all stations and include the switching of cars both empty and loaded to and from such track; also to and from transfer, team or sidetracks of the Northern Pacific Terminal Company at Portland, Oregon, and to and from point of transfer with connecting carriers at stations shown below." These stations shown below name the different points at which transfer with connecting carriers exist. I will add to that the fact that in 1905, I believe it was, the question came up as to the necessity for showing the Northern Pacific Terminal Company as a party to the tariffs, and it was held under Interstate Commerce Commission rules, and also the condition under which tariffs would be applied that it was a separate railroad and must be made a party to all our tariffs. The tariff under question, 729, naming our local rates to Portland provides that it is subject to the rules and regulations governing terminal service; as such the Northern Pacific Company is made a party to all Southern Pacific Tariffs applying to and from Portland under Interstate Commerce Commission rules governing tariff publication.

Q. Now, I want to ask you some questions about Mr. Parrington's testimony this afternoon. You heard it, didn't you?

A. Yes, sir.

Q. Is there a joint and proportional rate named

by Tariff 1-B from the point of origin on the Southern Pacific lines to St. Johns?

A. There is a proportional rate named to East Portland, Portland, on traffic destined beyond, but that proportional rate is a rate of the Southern Pacific Company.

Q. Is it a joint rate?

A. No, it is not a joint rate.

Q. Is it a joint through rate?

A. No, sir; it is simply the factor used in making a rate.

Q. Was there any joint through rate in existence on sugar during the period of federal control from the points named in plaintiff's complaint to St. Johns?

A. No, sir.

Q. You heard Mr. Parrington's explanation of his theory to the effect that there was no restriction on the application of the rates named in tariffs of the 6-Series, as to method and place of delivery, because the similar restriction was not set out in full in Tariff 1-B. Did you hear that?

A. Yes, sir.

Q. What is your interpretation of that situation?

A. I don't agree with Mr. Parrington.

Q. Tell the court why.

A. We have here a tariff which provides that in

order to arrive at a rate on sugar from California to St. Johns or to points on the O.-W. R. & N. Company's line, that a certain figure will be used in connection with the rate made. Each rate is dependent upon the factors governing it, and by referring to Item 75 of Tariff 1-B, we find "terminal charges, privileges and allowances" which states "shipments made at rates named herein are subject to the terminal charges, privileges and allowances provided by tariffs of individual lines, parties to this tariff, and lawfully on file with the Interstate Commerce Commission." The factor used in making a rate beyond Portland is carried in O.-W. R. & N. Tariff No. 6-C, I. C. C. 312, effective October 25, 1914. In addition to that, Tariff 2-A was another O.-W. R. & N. Company tariff to be used in connection with the proportional rates, that tariff being O.-W. R. & N. I. C. C. 107—pardon me, I quoted the I. C. C. Number 6-C, I believe incorrectly—no, that is right, 312. The latter tariff was the general class and commodity tariff, applying between Portland and East Portland to points on the O.-W. R. & N. Co. line in Oregon, Washington and Idaho, included in which were rates between East Portland and Portland and St. Johns. With the tariffs being governed, or rather the factors being governed by the rules and regulations and conditions of each publication in which they were carried, the rates in Tariff 6-C (that is, 37½ cents a ton, minimum twenty tons) could not be applied except under the limitations of that tariff, and in accordance with Interstate Commerce Commission tariff rules. The tariff carries under the head of a general application

on page 2, Item 1, the following: "Terminal facilities provided by this company—" meaning the O.-W. R. & N. Company, which is the issuing line—"are intended and required for its own business in view of which and the practice generally prevailing with respect to the use of terminal facilities, the rates named herein will not apply to or from team tracks on freight received from or delivered to connecting lines." With this application is carried a note reading: "Freight will not be accepted on or delivered to warehouse or industrial tracks when for interchange with connecting carriers unless shipped by or consigned to parties permanently located on such warehouse or industrial tracks." The switching rate being thus limited in these applications brings us to the class rate tariff which is the only tariff naming rates to be applied in connection with the shipments consigned to or to be shipped by anyone not having regular industrial tracks and warehouses.

MR. FARRENS: Mr. Mulchay, I hand you plaintiff's exhibits 25 and 26. Having in mind Mr. Harney's testimony, that was not delivered to a party permanently located on an industrial track at St. Johns, what rate should have applied to the movement from East Portland—

MR. WILSON: Why limit to industrial tracks at St. Johns?

MR. FARRENS: That is the way the tariff reads.

MR. WILSON: Not as I read it. Why not ship to some person with industrial track down at St. Johns?

A. Wadhams & Kerr Company to my certain knowledge have no industrial track or warehouse at St. Johns, and the only legal rate which would be applicable to this shipment would be the proportional rate in effect at the time of the movement, which is 20½ cents plus the class rate, that is the fifth class rate, of 11 cents, Portland to St. Johns, making through rate 31½ cents, instead of the rate as charged 20½ cents plus 47 cents per ton.

MR. FARRENS: Mr. Mulchay, that through rate of 31½ cents had been a departure from the fourth section of the act of the Interstate Commerce Commission, that is it had been less than the rate to Portland?

A. Would not have been less than the rate to Portland, no. But it would have been a rate less than applied to points south of St. Johns and south of Portland, therefore was a departure from the fourth section of the act.

Q. What I mean, as between the Portland rate and the St. Johns rate?

A. No, sir.

Q. Would the combination of the proportional rate with the class rate, which you say is the proper method of making that rate, have produced a less rate to St. Johns than the rate to Portland?

A. No, sir; not at the time that shipment was made.

Q. Would they have been even?

A. Yes, sir. I have a question in my mind, the rate to St. Johns, the 32 cents—the question of fractions, I get plus 31½ cents but call it 32.

Q. With respect to this theory of the plaintiff to the effect that Portland is intermediate to St. Johns as a matter of routing, I wish you would tell the court if plaintiff's theory is correct—or rather assuming that plaintiff's theory is correct, what would prevent Tillamook from being intermediate to St. Johns?

A. The same reasoning would hold good in the case of any branch line movement, it simply being a degree, measuring by the amount of mileage out on the line.

Q. In other words, you mean it would always be possible for a shipment to be hauled by the main line, out to some point on a branch line, and back to the main line junction again, and on to final destination.

A. Yes, sir; shipments for St. Johns consigned through do not come to Portland.

Q. Did you hear Mr. Parrington's testimony yesterday with respect to the Portland Jefferson Street line—Portland Jefferson Street station line?

A. Yes, sir.

Q. Where was the Portland Jefferson Street sta-

tion on the Southern Pacific line during the period of federal control?

A. At the foot of Jefferson Street and on the west bank of the Willamette River; about two miles, possibly a little more, south of our main line station at Park and Hoyt Streets, in the terminal yard.

Q. Now, during the period of federal control, did the proportional rate mentioned in plaintiff's complaint apply at Southern Pacific Portland Jefferson Street station?

A. Yes, sir.

Q. The proportional rate, I say?

A. No, sir; I thought you said the local rate. No, the proportional rate on St. Johns business does not apply to Front and Jefferson.

Q. Would the proportional rate apply to shipment moving from any of the points of origin mentioned in plaintiff's complaint to the Jefferson Street station as final destination?

A. No, sir.

Q. During the period of federal control could a carload of sugar have been routed by Southern Pacific west side lines from the Jefferson Street station to Portland Park Street station, or by Southern Pacific west side lines and O.-W. R. & N. lines through Portland Park Street station to St. Johns?

A. No, sir.

Q. Why not?

A. While there is a physical connection as between our Jefferson Street station and our Park Street station to the Northern Pacific terminal yard we are prohibited from handling freight over the line, which is our electric line leading west from our main line at the foot of Jefferson Street to Fourth Street, continuing north on Fourth to Fourth and Hoyt Streets, where it connects with Northern Pacific Terminal Company, but the franchise under which that line is operated will not permit us to haul freight.

Q. Is that the only physical connection directly between the Jefferson Street station and the Portland Park and Hoyt Street station, which is owned by the Southern Pacific Company?

A. Yes, sir.

Q. Mr. Parrington said yesterday that there was an actual, physical rail connection over which freight cars could be moved between the Portland Jefferson Street station and the Portland Park and Hoyt Street station; is that a fact?

A. Well, there is a line over which cars may be handled but not Southern Pacific; the United Railways could be used to haul the cars between the two terminals.

Q. If the United Railway lines that Mr. Parrington referred to were used to haul a carload of sugar from point of destination mentioned in plaintiff's complaint, through the Jefferson Street station, thence over

the United Railway lines, the Northern Pacific Terminal Lines, the O.-W. R. & N. Co. lines to St. Johns, what rates would apply?

A. It would be the rate to Jefferson Street.

Q. What rate would that be?

A. Well, at the present time—

Q. I mean what tariff would that rate be named on?

A. That would be rate named by Southern Pacific local tariff; I presume you are speaking of sugar now?

Q. Yes, carload of sugar.

A. Would be rate named by Southern Pacific local tariff. Taking San Francisco for illustration, 20 cents to Portland Jefferson Street.

Q. Is that 20 cents local or proportional rate?

A. That was local rate. I am taking for illustration San Francisco before the general increase just to illustrate.

Q. I want you to tell whether local, proportional or what kind of rates they are?

A. Would be local rates Southern Pacific to Jefferson Street, plus switching charges United Railways from Jefferson Street to their connection with the Northern Pacific Terminal Company, which I think is on Twelfth Street, North Twelfth Street, plus the local rate O.-W. R. & N. Company from Portland to St. Johns.

Q. Now, would the rate made up of these combinations be more or less than Southern Pacific Company's local rate to Portland and East Portland?

A. That would be higher, materially.

Q. So that in the case of a shipment moving as suggested by Mr. Parrington via the Jefferson Street station, and via West Portland and East Portland to St. Johns, there would be no fourth section departure at Portland?

A. No, sir; but the United Railways is not a party to the tariff, and under no conditions could the rates in this tariff be applied.

Q. Is the United Railways named in Tariff 1-B as one of the lines whose rates can be combined with the proportional rate for making total rate for some point beyond Portland?

A. No, sir.

Thereupon the witness was asked to explain the application of Rule 77 of the Interstate Commerce Commission, Circular 18-A, and over the objection of counsel for plaintiff testified as follows:

Pacific Freight Tariff Bureau 1-B, also Southern Pacific Local Tariff No. 729-Series, both carry on their face a clause to the effect that "by authority of Rule 77 of the Interstate Commerce Commission, Tariff Circular 18-a, rates on individual items"—making specific reference to Items 170 and 175 of Tariff 1-C and 165 and 170 of Tariff 1-B and 170 and 175 of Tariff 1-D,

and a similar rule in Tariff 729—continue "are not made applicable from or to, as the case may be, all intermediate points. Upon reasonable request therefor, rates which will not exceed those in effect to or from, as the case may be, more distant points will, under authority granted by the Interstate Commerce Commission, be established from or to, as the case may be, any intermediate point hereunder upon one day's notice to the Commission and to the public." These particular tariffs and referring specifically now to Tariffs 1-B, 1-C and 1-D, issued by F. W. Gomph, Agent, Pacific Freight Tariff Bureau, all carry through rates. These specify through rates from points in California to a specified destination without any reference to use of proportional rates or local rates to or from Portland and East Portland. These rates all carry, wherever the fourth section is not involved under a special order, by application reference to items mentioned on account of Rule 77. I would like to read one paragraph of Rule 77 of the Interstate Commerce Commission: "Tariffs should not contain volumes of unnecessary rates, and it is undesirable to require the posting of large numbers of tariffs at points from which no shipments are likely to move"—and a like ruling is carried, that is another section of this rule, "leading to points where shipments are not likely to move. Therefore until further orders carriers may file tariffs containing commodity rates applicable from known points of production without making such rates applicable from or to all intermediate points, which points should carry reference to Rule 77

on its title page." Now, this rule does not hold out the making of the fourth section rates to Portland or St. Johns at the intermediate points.

CROSS EXAMINATION

Questions by Mr. Wilson.

Under the O.-W. R. & N. Co.'s tariff, if a person had a permanent location on a switch track at St. Johns he could get sugar from San Francisco delivered there for less than a man located in Portland, but if a person were not permanently located on the switch track at St. Johns he would have to pay a higher rate than Portland.

The mere publication of a lower rate for a longer haul is not a violation of the fourth section of the Act to Regulate Commerce. If there is no movement of goods to the more distant point and no freight charges assessed or collected on the lower rate, there is no violation of the fourth section of the act.

Southern Pacific Company's terminal tariffs specifically set forth the Southern Pacific stations within the limits of the City of Portland and shows them to be Portland Park Street, East Portland and Portland Jefferson Street. The proportional rate published in Tariffs Nos. 1-B, 1-C, and 1-D are not applicable to shipments moving through or to Portland Jefferson Street station. The rates on commodities shipped from points in California to Portland Jefferson Street station are the same as the rate published to East Portland

station and to Portland Park Street station, but locally there are many variations in the rates named to these three stations. The Portland Jefferson Street station is not named in the tariff which carries the proportional rate.

The primary and original reason why the station of Portland was named in connection with the proportional rate was on account of the fact that the tariff provides for use of proportional rate in connection with local rates on the Northern Pacific Railway Company lines beyond Portland.

Shipments billed to Portland and placed there for delivery would be subject to the switching charge of the Northern Pacific Terminal Company and the local rate of the O.-W. R. & N. Co. if reconsigned from Portland to St. Johns. The proportional rate would not have been applicable for use in connection with such a shipment.

REDIRECT EXAMINATION.

Questions by Mr. Farrens.

The naming of Portland in Tariff 1-B for the purpose of permitting interchange with the Northern Pacific Railway Company on the proportional rate has existed at least twenty-five years to my knowledge. There has always been need for it and there always will be need for it.

TESTIMONY OF BEN C. DEY for DEFENDANT

BEN C. DEY, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

I am a practicing attorney of this city and admitted to the bar of this state. I have been practicing 17 years, and have had experience with litigation growing out of rates and rate structure and freight charges. I am familiar with the issues involved in this case and with the work done by Mr. Wilson in the preparation and trial of this case. Five hundred dollars would be a fair attorney's fee.

TESTIMONY OF A. J. PARRINGTON, PLAINTIFF

A. J. PARRINGTON, recalled on his own behalf, testified that he had procured from Meier & Frank Company an assignment in the exact words as the assignments procured from his other assignors, but that such assignment has been lost.

This testimony was received over the objection of counsel for the defendant that said assignment was not executed in the manner required by Section 3477 of the Revised Statutes of the United States. An exception was allowed by the court.

CROSS EXAMINATION

Questions by Mr. Farrens.

The witness testified that the assignment from

Meier & Frank Company was for the purpose of collection only.

After argument of counsel, Mr. Wilson, as counsel for plaintiff, submitted to the court a request for findings of fact, conclusions of law and judgment for the plaintiff in the manner following:

This matter coming on for trial on the 1st day of June, 1923, and evidence having been introduced in behalf of both parties, and arguments had on June first, fourth and fifth, 1923, before the court without a jury, a jury having been waived by both parties by stipulation in writing filed herein, the plaintiff appearing by James G. Wilson, his attorney, and the defendant appearing by Paul P. Farrens and A. M. Bull, of his attorneys, and the court having taken the matter under advisement until this time, and being fully advised, does now make the following Findings of Fact and Conclusions of Law, to-wit:

FINDINGS OF FACT

I.

That the Southern Pacific Company is and was during all times mentioned in plaintiff's complaint, the owner of a line of railroad extending from the originating points mentioned in plaintiff's complaint to East Portland in the State of Oregon, and is and was the owner of a one-half interest in the railroad bridge extending from East Portland to Portland, Oregon, and is a joint lessee of the tracks and facilities of the North-

ern Pacific Terminal Company of Oregon in Portland, Oregon, has full rights of operating trains over said bridge and over the facilities and tracks of the Northern Pacific Terminal Company of Oregon, and has full rights to operate a line of railroad extending from said points of origin to all points reached by the tracks of the Northern Pacific Terminal Company of Oregon in the City of Portland, Oregon.

II.

That the Oregon-Washington Railroad & Navigation Company at all times mentioned in the complaint was a joint lessee of the tracks and facilities of the Northern Pacific Terminal Company of Oregon, with operating rights thereover in the City of Portland, Oregon, was the owner of a one-half interest in the bridge across the Willamette River from Portland to East Portland, Oregon, with full operating rights thereover, and was the owner of a line of railroad from East Portland to St. Johns in the State of Oregon, and had full operating rights from all points reached by the Northern Pacific Terminal Company of Oregon's tracks in the City of Portland to St. Johns, Oregon.

III.

That the stations known as Portland, East Portland and St. Johns, are all within the State of Oregon and within the corporate limits of the City of Portland, Oregon.

IV.

That from and after twelve o'clock noon of De-

cember 28th, 1917, to midnight February, 1920, which period was known as the period of federal control, the United States Railroad Administration was in control of the lines of railroad of the Southern Pacific Company extending from the points of origin, designated in the complaint in California, to Portland, Oregon, including the operating rights of said Southern Pacific Company over the bridge across the Willamette River between East Portland and Portland, and the rights over the terminal facilities and tracks of the Northern Pacific Terminal Company of Oregon, and was likewise during said period in possession and control of the line of railroad of the Oregon-Washington Railroad & Navigation Company between the stations of Portland and St. Johns, including the rights of said company over the tracks and facilities of the Northern Pacific Terminal Company of Oregon and across said Willamette River bridge between Portland and East Portland, and also operating said lines in interstate commerce as a common carrier under authority of the United States and the Director General of Railroads, and pursuant to tariffs, rules and regulations for such purpose adopted and provided.

V.

That at the stations of East Portland, Oregon, and Portland, Oregon, the line of railroad of the Southern Pacific Company connects with the line of railrod of the Oregon-Washington Railroad & Navigation Company, and that prior to the period of Federal Control the Southern Pacific Company published and filed with

the Interstate Commerce Commission rates on sugar in carload lots of the minimum weight of 44,000 pounds to be applied on the transportation of sugar from San Francisco, Marysville, Hamilton, Crockett and other points designated in the tariff as Group 1 points, Alvarado, Salinas, Visalia and Betteravia to the stations of Portland and East Portland to be applied on shipments when destined to points on the line of the Oregon-Washington Railroad & Navigation Company beyond Portland and East Portland, and that said rates so established from San Francisco, Crockett, Alvarado, Marysville, Hamilton and other points named in said tariff as Group 1 points, were 13 cents per 100 pounds; from Salinas and Visalia, 20½ cents per 100 pounds; and from Betteravia, 23 cents per 100 pounds; and that it was provided in said tariff that the rates from said originating points in California to points on the line of the Oregon-Washington Railroad & Navigation Company should be made by adding the said rate known as the proportional rate so established to the local rate from Portland or East Portland established by the Oregon-Washington Railroad & Navigation Company from Portland or East Portland to point of destination, including rates to stations on the Oregon-Washington Railroad & Navigation Company's line, contained in said company's tariff No. 6-B, I. C. C. 283, effective March 15, 1914, and amendments and re-issues thereof; that in and by Supplement No. 57 of Pacific Freight Tariff Bureau Joint and Proportional Freight Tariff 1-B, I.C.C. 110, effective June 25, 1918, which was pub-

lished and filed with the Interstate Commerce Commission, said proportional rate from said points in California to Portland and East Portland was increased so that the rate from and after the 25th day of June, 1918, became 16½ cents per 100 pounds from San Francisco, Marysville, Hamilton, Crockett, Alvarado and Group 1 points to Portland and East Portland; 25½ cents per 100 pounds from Salinas and Visalia to Portland and East Portland; and 29 cents per 100 pounds from Betteravia to Portland and East Portland, which said rate was continued in effect by said supplement and re-issues of said tariff up to and subsequent to the termination of federal control.

VI.

That the Oregon-Washington Railroad & Navigation Company published and filed with the Interstate Commerce Commission its Local Tariff No. 6-B, I. C. C. No. 283, effective March 15, 1914, wherein, by Item 70, it established and put in effect the rate from its stations of Portland and East Portland to its station of St. Johns in the State of Oregon of 37½ cents per ton of 2,000 pounds, with a minimum charge of $7.50 per car, which rate applied on sugar in carload lots; that said rate was continued in effect by said tariff and supplements and re-issues thereof up to and including the 30th day of December, 1919; that thereafter, in and by Supplement No. 23 of Oregon-Washington Railroad & Navigation Company's Local Freight Tariff No. 6-C, I. C. C. No. 312, Item 60-G, published and filed with the Interstate Commerce Com-

mission, and made effective December 31st, 1919, the said carrier established a rate from its station of Portland to its station of St. Johns of $7.50 per car, which had reference to note reading as follows:

> "Applies only on freight interchanged with water carriers at St. Johns. Or., and when delivered to or received from railroad connections of O.-W. R. & N. at East Portland, Or., or Portland, Ore., in line haul movement. Will not apply on carload freight originating at or destined to points reached via O.-W.R. & N. Lines and its connections where line haul can be performed by O.-W. R. & N. Lines."

That said tariff also continued in effect the rate of 37½ cents per 100 pounds between Portland, Oregon, and St. Johns, Oregon, without restriction, which said tariff continued in effect during the period of federal control; the court finds that the item providing for $7.50 per car applied on shipments of sugar over the lines in question from points of origin to St. Johns, Oregon.

VII.

That the United States Railroad Adminstration adopted and continued in effect the rates of the Southern Pacific Company and the Oregon-Washington Railroad & Navigation Company established before the period of federal control, and in effect at the time of the inception of said federal control, and joined in and were parties to the said rates established during said control.

VIII.

That the station of St. Johns is more distant from San Francisco, Marysville, Hamilton, Crockett, Alvarado, Visalia, Salinas and Betteravia over the line of the Southern Pacific and Oregon-Washington Railroad & Navigation Company by the route over which said rates were established as hereinbefore found than the station of Portland, Oregon, or the station of East Portland, Oregon, and the haul over said route between said points of origin in California to Portland in the State of Oregon is included within the haul over said route from said point of origin in California to St. Johns in the State of Oregon, and is in the same direction and over the same line or route, and the haul to Portland and to East Portland in the State of Oregon over said route is included within the haul from said point of origin in California to St. Johns in the State of Oregon, and on all shipments over said route from Crockett, Port Costa (a point in Group 1), Alvarado and Salinas, from January 1st, 1918, to and inclusive of June 24th, 1918, the United States Railroad Administration charged and collected the sum of 23 cents per 100 pounds on sugar in carload lots; and from San Francisco to Portland charged and collected the sum of 20 cents per 100 pounds; and from Betteravia and Hamilton the sum of 25 cents per 100 pounds; and from Visalia the sum of 27½ cents per 100 pounds; and in addition thereto collected thereon war tax at the rate of three per cent of the transportation charge; and on all shipments between and inclusive of June 25th, 1918, and the end of federal

control said railroad administration charged and collected on said shipments in carload lots from Crockett, Port Costa, Alvarado and Salinas the sum of 29 cents per 100 pounds; from San Francisco 25 cents per 100 pounds; from Betteravia and Hamilton 31½ cents per 100 pounds; together with a war tax of three per cent on the transportation charge.

IX.

That said charges were to the extent that the same exceeded the rate established and in effect from the various points in California to the station of St. Johns in the State of Oregon at the same time illegal and unlawful and charged without authority of law, and the exaction of the war tax on the excess of such charges of said rates from said respective points in California to St. Johns was illegal and unlawful and exacted without authority of law and in violation of Section 4 of the Act of Congress known as the Act to Regulate Commerce and amendments thereto, and that the only lawful rate in effect from January 1st, 1918, to and inclusive of June 24th, 1918, was as follows:

From Crockett, Port Costa, Alvarado, San Francisco and Hamilton, 14⅞ cents per 100 pounds; from Betteravia 24⅞ cents per 100 pounds, and from Visalia and Salinas 22⅜ cents per 100 pounds; plus a war tax of three per cent. upon the transportation charge; and that the only lawful rate to Portland or East Portland from June 25th, 1918, to and inclusive of December 30th, 1919, from the various points in California was as follows:

From Crockett, Port Costa, Alvarado, San Francisco and Hamilton, 18⅜ cents per 100 pounds; from Betteravia 30⅞ cents per 100 pounds; and from Visalia and Salinas 27⅜ cents per 100 pounds; plus a war tax of three per cent upon the transportation charge; and that the only lawful rate in effect to Portland or East Portland from said various points in California between the 31st day of December, 1919, and the end of federal control was as follows:

From Crockett, Port Costa, Alvarado, San Francisco and Hamilton, 16½ cents per 100 pounds, plus $7.50 per car; from Betteravia 29 cents per 100 pounds, plus $7.50 per car; and from Visalia and Salinas 25½ cents per 100 pounds, plus $7.50 per car; plus a war tax of three per cent upon the transportation charge.

X.

That the plaintiff's assignors shipped over the lines of the Southern Pacific from the points of origin shown, the shipments listed in the exhibits attached to the complaint and the stipulations amending the complaint filed in this cause, and paid to the United States Railroad Administration for such transportation, including war tax, the amount shown in the column headed "Freight, incl. war tax if any"; and the said United States Railroad Administration charged and collected the freight at the rate shown in the column headed "Rate", and the aggregate amount shown in the column headed "Freight, Inc. war tax if any"; that said collections were made on the dates shown in the column headed

"Date paid", and said shipments were made consigned to the persons shown at the head of each of said exhibits, and the freight was paid by such persons, and that each and all of said persons shown as consignees in said various exhibits paid to the United States Railroad Administration the freight charges on said various shipments shown in said column headed "freight, incl. war tax if any"; and that each and all of said consignees did, prior to the filing of said complaint and the stipulations amending said complaint, sell, transfer, and assign to the plaintiff their claims for the exaction by the United States Railroad Administraion for the transportation of said shipments, and the plaintiff is now the lawful owner and holder thereof; that the amount of said unlawful exaction, over and above the legal rate on the shipments so made, is the sum of Seven Thousand Eight Hundred Six Dollars and Five Cents ($7,806.05).

XI.

That the court finds that a reasonable attorney's fee in this court for the collection of said claims is the sum of Seven Hundred and Fifty Dollars ($750.00); said attorney's fee to cover only the work with reference to collection in this court and not on any appeal therefrom.

From the foregoing Findings of Fact the court makes the following

CONCLUSIONS OF LAW

I.

That the charges collected from the plaintiff's assignors for the transportation of sugar in carload lots from the various points of origin in California to Portland and East Portland were illegal and in violation of the amended fourth section of the Act to Regulate Commerce to the extent that the same exceeded the rates established and in effect from said various originating points to St. Johns in the State of Oregon at the time of the movement of said respective shipments.

II.

That the defendant is liable to the plaintiff for the excess charges over and above the charges which would have been assessed at the rate in effect between the said originating points and St. Johns at the time the respective shipments moved.

III.

That the plaintiff is entitled to judgment against the defendant for the sum of Seven Thousand Eight Hundred Six Dollars and Five Cents ($7,806.05), together with interest at the rate of six (6) per cent per annum from June 1st, 1919, together with the sum of Seven Hundred and Fifty Dollars ($750.00) attorney's fees, and plaintiff's costs and disbursements incurred herein.

Thereupon Mr. Farrens, as attorney for defendant, submitted in writing to the court the following objec-

tions to findings of fact and conclusions of law proposed and requested by plaintiff:

OBJECTIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Comes now the defendant and objects to and excepts to certain findings of fact and conclusions of law requested by the plaintiff as follows, to-wit:

I.

Defendant objects and excepts to finding of fact I, alleging same to be immaterial to any proper or legal issue in this case.

The court overruled said objection, to which ruling of the court counsel for the defendant excepted and his exception was duly allowed.

II.

Defendant objects and excepts to finding of fact II, alleging same to be immaterial to any proper or legal issue in this case.

The court overruled said objection, to which ruling of the court counsel for the defendant excepted and his exception was duly allowed.

III.

Defendant objects and excepts to finding of fact III, alleging same to be immaterial to any proper or legal issue in this case.

The court overruled said objections, to which ruling of the court counsel for the defendant excepted and his exception was duly allowed.

IV.

Defendant objects and excepts to finding of fact IV, alleging same to be immaterial to any proper or legal issue in this case.

The court overruled said objection, to which ruling of the court counsel for the defendant excepted and his exception was duly allowed.

V.

Defendant objects and excepts to finding of fact V and alleges the same to be immaterial to any proper or legal issue in this case, and that the same is not supported by the evidence, particularly with respect to that portion of the finding which recites that it was provided in said tariff that the rates from said originating points in California to points on the line of the Oregon-Washington Railroad & Navigation Company should be made by adding the said rate known as the proportional rate, so established, to the local rate from Portland or East Portland, established by the Oregon-Washington Railroad & Navigation Company from Portland or East Portland to point of destination, including rates to stations on the Oregon-Washington Railroad & Navigation Company's line, contained in said company's tariff No. 6-B, I. C. C. 283, effective March 15, 1914, and amendments and re-issues thereof.

The court overruled said objection, to which ruling of the court counsel for the defendant excepted and his exception was duly allowed.

VI.

Defendant objects and excepts to finding of fact VI and alleges the same to be immaterial to any proper or legal issue in this case, and that the same is not supported by the evidence, particularly with respect to that portion of the finding which recites that the rate named in said finding applied to carload shipments of sugar over the lines in question from points of origin to St. Johns, Oregon, for the reason that the uncontroverted evidence showed that said rates were so restricted by tariff provisions as to be inapplicable to St. Johns, and further that no carload shipments of sugar were received at St. Johns during federal control of railroads.

The court overruled said objection, to which ruling of the court counsel for the defendant excepted and the exception was duly allowed.

VII.

Defendant objects and excepts to finding of fact VII and alleges same to be immaterial to any proper or legal issue in this case, and that the same is not supported by the evidence.

The court overruled said objection, to which ruling of the court counsel for the defendant excepted and the exception was duly allowed.

VIII.

Defendant objects and excepts to finding of fact VIII and alleges same to be immaterial to any proper or legal issue in this case, and that the same is contrary

to and not supported by the evidence, particularly with respect to that portion of the finding which recites that the station of Portland is intermediate to California points and St. Johns, Oregon, within the meaning of the short and long haul provision of the fourth section of the Act to Regulate Commerce, as amended.

The court overruled said objection, to which ruling of the court counsel for the defendant excepted and the exception was duly allowed.

IX.

Defendant objects and excepts to finding of fact IX and alleges same to be immaterial to any proper or legal issue in this case, and that the same is contrary to and not supported by the evidence.

The court overruled said objection, to which ruling of the court counsel for the defendant excepted and the exception was duly allowed.

X.

Defendant objects and excepts to that portion of finding of fact X, which recites that the consignees assigned their claims to plaintiff, that plaintiff is the lawful owner and holder of said claims, and that there was an exaction over and above the legal rate on the shipments, and alleges that said portion of said finding is contrary to and not supported by the evidence.

The court overruled said objection, to which ruling of the court counsel for the defendant excepted and the exception was duly allowed.

XI.

Defendant objects and excepts to finding of fact XI and alleges that the same is immaterial to any proper or legal issue in this case, and that since there were no overcharges no attorney's fee can be properly allowed, and avers that attorney's fees are not allowable against the defendant.

The court overruled said objection, to which ruling of the court counsel for the defendant excepted and the exception was duly allowed.

XII.

Defendant objects and excepts generally to said findings of fact for that said proposed findings of fact are specific in nature and yet fail to cover many of the issues made upon the pleadings and the evidence in this case.

The court overruled said objection, to which ruling of the court counsel for the defendant excepted and the exception was duly allowed.

XIII.

Defendant objects and excepts to conclusion of law I, alleging same to be erroneous, and that a proper conclusion to be drawn from the facts is that the charges collected from plaintiff's alleged assignors were legal and not in violation of the amended fourth section of the Act to Regulate Commerce, and that the said rates

as collected were the only lawfully published and effective rates applicable to the shipments involved.

The court overruled said objection, to which ruling of the court counsel for the defendant excepted and the exception was duly allowed.

XIV.

Defendant objects and excepts to conclusion of law II, alleging same to be erroneous, and that a proper conclusion to be drawn from the facts is that the defendant is not liable to plaintiff in any amount whatsoever.

The court overruled said objection, to which ruling of the court counsel for the defendant excepted and the exception was duly allowed.

XV.

Defendant objects and excepts to conclusion of law IV, alleging same to be erroneous, and that the proper conclusion is that the defendant is entitled to a judgment against the defendant for his costs and disbursements.

The court overruled said objection, to which ruling of the court counsel for the defendant excepted and the exception was duly allowed.

XVI.

Defendant objects and excepts generally to a judg-

ment in favor of plaintiff for any sum of money and requests a judgment in favor of the defendant for the reason that the testimony properly supports such judgment.

The court overruled said objection, to which ruling of the court counsel for the defendant excepted and the exception was duly allowed.

Thereupon Mr. Farrens, as attorney for defendant, submitted in writing to the court the following motion for special findings of fact and conclusions of law:

The evidence of the respective parties having been received by the court and no findings of fact, conclusions of law or judgment having been yet entered in this cause, now comes the defendant by its attorneys of record and moves the court to make the following specific findings of fact and specific conclusions of law in accordance with the evidence, to wit:

SPECIAL FINDINGS OF FACT.

I.

That the defendant is the duly appointed, qualified and acting agent of the United States Railroad Administration, appointed under Section 206-A of the Transportation Act of Congress of 1920, and has authority to represent said Railroad Administration in the defense of this action.

II.

That Southern Pacific Company was during all the times mentioned in plaintiff's complaint the owner or lessee of a line of railroad extending from the originating points mentioned in plaintiff's complaint to East Portland in the State of Oregon, and was the lessee of a one-half interest in the railroad bridge extending from East Portland to the west bank of the Willamette River in Portland, Oregon, and was a joint lessee of the tracks and facilities of Northern Pacific Terminal Company of Oregon in Portland, Oregon, which latter company on behalf of Southern Pacific Company received all carload freight from Southern Pacific Company destined to consignees located on tracks of Northern Pacific Terminal Company and delivered the same.

III.

That Oregon-Washington Railroad & Navigation Company at all times mentioned in plaintiff's complaint was a joint lessee of the tracks and facilities of Northern Pacific Terminal Company of Oregon, which said latter company on behalf of said Oregon-Washington Railroad & Navigation Company received from said Oregon-Washington Railroad & Navigation Company all carload freight destined for delivery to consignees located upon tracks of said Northern Pacific Terminal Company and delivered the same; that said Oregon Washington Railroad & Navigation Company was the owner of a line of railroad extending from East Portland to St. Johns, in the State of Oregon, and was the owner of a half interest in the bridge crossing the Wil-

lamette River from East Portland to the west bank of the Willamette River.

IV.

That the station known as East Portland is located within the corporate limits of the City of Portland, Oregon, on the easterly bank of the Willamette River; that the station known as St. Johns is located on the east bank of the Willamette River on the line of the Oregon-Washington Railroad & Navigation Company's railroad, and is several miles north of said station of East Portland; that the station of St. Johns is more distant from San Francisco, Marysville, Hamilton, Crockett, Alvarado, Visalia, Salinas and Betteravia over the line of Southern Pacific Company and Oregon-Washington Railroad Company than the station of East Portland, and that the haul over said lines of railroad between said points in California to East Portland is included within the haul over said lines of railroad to St. Johns and is in the same direction and over the same line or route, and that the haul to East Portland over said route is included within the haul from said points in California to St. Johns.

That the station of Portland is located on the west side of the Willamette River and is on the line of railroad of the Northern Pacific Terminal Company of Oregon; that the station of Portland is connected with the station of East Portland by a bridge constructed across the Willamette River at a cost of approximately $....., and by the line of railroad of the

Northern Pacific Terminal Company of Oregon; that there are no physical railroad connections by the use of which shipments originating in California could be hauled via the lines of Southern Pacific Company and Oregon-Washington Railroad & Navigation Company through Portland to the station of St. Johns; that in order to pass to or through the station of East Portland shipments originating at points in California and destined to St. Johns' Oregon, would have to be hauled from the station of East Portland over the bridge across the Willamette River to the west bank of the Willamette River, thence via the line of the Northern Pacific Terminal Company of Oregon to the station of Portland, thence returned in a back-haul movement via the line of the Northern Pacific Terminal Company of Oregon and across the bridge over the Willamette River to the station of East Portland, and thence northward over the line of the Oregon-Washington Railroad & Navigation Company to St. Johns; that the route from East Portland to Portland and return to East Portland, and the haul over the lines of railroad from East Portland to Portland and return to East Portland is not included within the haul from points in California to St. Johns, Oregon, and is not in the same direction and over the same line or route, and the haul from East Portland to Portland and return to East Portland is not included within the haul from points in California to St. Johns, Oregon; that the station of St. Johns, Oregon, is not more distant from the points in California named in plaintiff's complaint over lines

of Southern Pacific Company and Oregon-Washington Railroad & Navigation Company than the station of Portland, and the haul over said route between said points in California to Portland is not included within the haul over said route to St. Johns, and is not in the same direction and over the same line or route.

V.

That from and after twelve o'clock noon of December 28, 1917, to midnight of February 29, 1920, which period was known as the period of federal control, the United States Railroad Administration was in control of the lines of railroad of Southern Pacific Company from the points of origin in California designated in the complaint to East Portland, Oregon, including the operating rights of said Southern Pacific Company over the bridge across the Willamette River between East Portland and the west bank of the Willamette River, and the rights over the terminal facilities and tracks of the Northern Pacific Terminal Company of Oregon, and was likewise during said period in possession and control of the line of railroad of Oregon-Washington Railroad & Navigation Company between the stations of East Portland and St. Johns, including the rights of said company in the bridge from East Portland across the Willamette River to the west bank of said river, and also including the rights of said company over the tracks and facilities of Northern Pacific Terminal Company of Oregon, and also operating said lines in interstate commerce as a common carrier under authority

of the United States and the Director General of Railroads, and pursuant to tariffs, rules and regulations for such purposes adopted, provided and initiated by the President of the United States acting by and through said Director General of Railroads.

VI.

That prior to the period of federal control Southern Pacific Company published and filed with the Interstate Commerce Commission rates on sugar in carload lots of the minimum weight of 44,000 pounds to be applied on the transportation of sugar from San Francisco, Marysville, Hamilton, Crockett and other points designated in the tariff as Group 1 points, Alvarado, Salinas and Visalia to the stations of Portland and East Portland to be applied on shipments when destined to points on the line of the Oregon-Washington Railroad & Navigation Company beyond East Portland, and that said rates so established from San Francisco, Crockett, Alvarado, Marysville, Hamilton and other points named in said tariff as Group 1 points, were 13 cents per 100 pounds; from Salinas and Visalia 20½ cents per 100 pounds; and that it was provided in said tariff that the rates from said originating points in California to points on the line of the Oregon-Washington Railroad & Navigation Company should be made by adding the said rate known as the proportional rate so established to the local rate from East Portland established by the Oregon-Washington Railroad & Navigation Company from East Portland to the point of destina-

tion, including rates to stations on the Oregon-Washington Railroad & Navigation Company's line, contained in said company's tariff No. 6-B, I. C. C. 283, effective March 14, 1914, and amendments and reissues thereof; that in and by Supplement No. 57 of Pacific Freight Tariff Bureau Joint and Proportional Freight Tariff 1-B, I. C. C. 110, effective June 25, 1918, which was published and filed with the Interstate Commerce Commission, said proportional rate from points in California to Portland and East Portland were so increased that the rate from and after the 25th day of June, 1918, became 16½ cents per 100 pounds from San Francisco, Marysville, Hamilton, Crockett, Alvarado and Group 1 points to Portland and East Portland and 25½ cents per 100 pounds from Salinas and Visalia to Portland and East Portland, which said rates were continued in effect by said supplement and reissues of said tariff up to the termination of federal control.

VII.

That the Oregon-Washington Railroad & Navigation Company published and filed with the Interstate Commerce Commission its local tariff No. 6-B, I. C. C. No. 283, effective March 15, 1914, wherein by Item 70 it established and put in effect a rate from the stations of Portland and East Portland to its station of St. Johns in the State of Oregon, of 37½ cents per ton of 2000 pounds, with a minimum charge of $7.50 per car, which rate applied on sugar in carload lots, and said local tariff No. 6-B and all supplements and re-issues

thereof in effect during the period of federal control of railroads contained an item numbered 1, wherein and whereby it was provided as follows:

> "Subject, application to and from connecting lines.
>
> "Terminal facilities provided by this Company are intended and required for its own business, in view of which, and the practice generally prevailing with respect to the use of terminal facilities, on rates named herein, will not apply to or from team tracks on freight received from or delivered to connecting lines.
>
> "NOTE:—Freight will not be accepted at or delivered to warehouse or industry tracks when for interchange with connecting carriers, unless shipped by or consigned to parties permanently located on such warehouse or industry tracks."

And the court further finds that during the period of federal control of railroads there were no parties located at St. Johns, Oregon, on warehouse or industry tracks by whom freight could have been shipped or to whom freight could have been consigned.

That the rate named in the tariff last above mentioned was continued in effect by said tariff and supplements and re-issues thereof up to and including the 30th day of December, 1919; that thereafter, in and by Supplement No. 23 of Oregon-Washington Rail-

road & Navigation Company's Local Freight Tariff No. 6-C, I. C. C. No. 312, which tariff was initiated, published and filed with the Interstate Commerce Commission by the President of the United States, acting through the Director General of Railroads, and made effective December 31, 1919, the said defendant established a rate from its station at Portland to its station at St. Johns of 37½ cents per 100 pounds, and that said last mentioned tariff by its Item 60-G established a rate from the station of Portland to the station of St. Johns of $7.50 per car, subject to a condition expressed in said item in words and figures as follows:

> "Applies only on freight interchanged with water carriers at St. Johns, Ore., and when delivered to or received from railroad connections of O.-W. R. & N. at East Portland, Ore. or Portland, Ore. in line haul movement. Will not apply on carload freight originating at and destined to points reached via O.-W. R. & N. lines and its connections where line haul can be performed by O.-W. R. & N. lines."

And the court further finds that said item providing for $7.50 per car was not applicable on shipments of sugar over the lines in question from points of origin to St. Johns, Oregon, as a point of ultimate destination.

VIII.

That from the time of the commencement of federal control until and including June 24, 1918, S. P. Tariff

No. 729-B, I. C. C. No. 3659, was lawfully published and in effect, and Item 102-A of said tariff provided rates on sugar in carload lots to Portland and East Portland, Oregon, as follows: From San Francisco, California, 20 cents per 100 pounds; from Alvarado, Crockett and Salinas, California, 23 cents per 100 pounds; from Hamilton and Betteravia, California, 25 cents per 100 pounds, and from Visalia, California, 27½ cents per 100 pounds.

That from June 25, 1918, until the termination of federal control of railroads the lawfully published and effective tariff was S. P. Tariff No. 729-C, I. C. C. No. 4092, and that Item No. 1870 of said tariff provided rates on sugar in carloads to Portland and East Portland as follows: From San Francisso, California, 25 cents per 100 pounds; from Alvarado, Crockett and Salinas, California, 29c per 100 pounds; from Hamilton and Betteravia, California, 31½ cents per 100 pounds, and from Visalia, California, 34½ cents per 100 pounds.

That the above mentioned freight rates were the only lawfully published and effective freight rates applicable on sugar in carload lots from the points of origin above mentioned to the points of destination above mentioned during the period of federal control of railroads, and that said rates were collected by defendant from the consignees mentioned in plaintiff's complaint on all shipments described in said complaint and the stipulations amending the same.

IX.

That O.-W. R. & N. Co. Tariff No. 2-A, I. C. C. No. 107, effective March 25, 1912, and North Pacific Coast Freight Bureau Tariff No. 2, S. J. Henry, Agent, I. C. C. No. 18, effective December 31, 1919, were the only lawfully published and effective tariffs covering the transportation of sugar from the stations of Portland and East Portland and the station of St. Johns, Oregon, and that said tariffs named a rate on sugar in carload lots from Portland, Oregon, to St. Johns, Oregon, of 7 cents per 100 pounds, which rate remained in effect from the commencement of federal control of railroads until June 25, 1918, on which date application of the Director General's Order No. 28 raised said rate to the sum of 9 cents per 100 pounds, which rate remained in effect until termination of Federal Control.

X.

That the President of the United States, acting through the Director General of Railroads, adopted, initiated and continued in effect the rates of Southern Pacific Company and Oregon-Washington Railroad & Navigation Company established before the period of federal control, and in effect at the time of the inception of federal control, and initiated and established all rates which were published during federal control.

XI.

That no carload shipments of sugar were received at the station of St. Johns during the period of federal control of railroads.

XII.

That the station of Betteravia was and is located exclusively on the line of railroad of the Santa Maria Valley Railroad Company, which said railroad company was not under federal control.

XIII.

That all carload shipments of sugar mentioned in plaintiff's complaint to Wadhams & Kerr Bros. were delivered to said Wadhams & Kerr Bros. at Thirteenth and Davis Streets in the City of Portland, on lines of the Spokane, Portland & Seattle Railway Company at a point beyond the station of Portland and beyond the line of the Northern Pacific Terminal Company of Oregon.

XIV.

That all shipments of sugar mentioned in plaintiff's complaint as received by Allen & Lewis Company were delivered to said company at a point on the line of railroad of the United Railways Company, which said point was beyond the station of Portland and more distant from the station of East Portland than the station of Portland; and that the haul from California points to said point on said United Railways Company's line is not included within the haul from said California points to St. Johns and is not in the same direction or over the same line or route; and that said United Railways Company's line was not under federal control at any time after June 26, 1918.

XV.

That none of the assignments executed by the consignees named in the complaint in favor of the plaintiff were executed with the formalities required by Section 3477 of the Revised Statutes of the United States, and that no United States treasury warrant for the payment of said choses in action had been issued at or prior to the time of the execution of any of said assignments.

XVI.

That the various consignees named in plaintiff's complaint and the stipulations amending the same received from the points of origin the shipments listed in the exhibits attached to the complaint and the stipulations amending the complaint, and paid to the United States Railroad Administration for such transportation, including war tax, the amounts shown in the column headed "Freight, incl. war tax if any"; and the defendant charged and collected the freight at the rate shown in the column headed "Rate", and the aggregate amount in the column headed "Freight, inc. war tax if any"; that said collections were made on the dates shown in the column headed "Date paid" and said shipments were consigned to the persons shown at the head of each of said exhibits and the freight was paid by such person.

And the defendant further moves the court to make the following

CONCLUSIONS OF LAW.

I.

That the charges collected from the consignees named in plaintiff's complaint and amendments thereto were in accord with the only true, lawful, published and effective rates in effect during the period of federal control, covering the transportation of sugar in carload lots from the various points of origin in California to Portland and East Portland.

II.

That none of the tariffs covering transportation of sugar in carload lots between points of origin and points of destination mentioned in plaintiff's complaint created departures from the amended fourth section of the Act to Regulate Commerce.

III.

That the assignments executed by the consignees mentioned in plaintiff's complaint and stipulations amending the complaint, in favor of the plaintiff, were void and of no effect, and that the plaintiff is not the owner of the choses in action alleged in said complaint and the amendments thereto.

IV.

That neither the plaintiff nor any of the consignees named in plaintiff's complaint and the amendments thereto suffered any damage or loss by reason of any of the facts alleged in said complaint and amendments thereto.

V.

That the statute of limitations provided for in the Act to Regulate Commerce, as amended, has destroyed all liability with respect to all claims mentioned in plaintiff's complaint, and amendments thereto, on which freight charges were paid more than two years prior to the date on which this action was commenced, to-wit, all claims on which freight charges were paid prior to the 16th day of September, 1919.

VI.

That the Interstate Commerce Commission has exclusive original jurisdiction in this action, and that this court has no jurisdiction of the subject matter of this action.

VII.

That the Director General of Railroads was not, at any time mentioned in plaintiff's complaint or amendments thereto, and is not now, amenable to the long and short haul provision of the fourth section of the Act to Regulate Commerce, as amended.

VIII.

That a judgment against the defendant in conformity with the prayer of the complaint, or a judgment for any sum of money whatsoever on the causes of action alleged in the complaint would amount to the execution of a penalty from the United States government.

IX.

That the complaint herein should be dismissed and defendant have judgment against plaintiff for his costs and disbursements herein.

The court thereupon overruled the defendant's motion for special findings of fact and conclusions of law, as to each and every such requested special finding and conclusion, to which ruling the defendant duly excepted, and such exceptions were allowed by the court.

Thereupon the court signed the findings of fact and conclusions of law requested by the plaintiff and ordered same filed as the decision of the court in said cause, to which ruling of the court counsel for defendant excepted and exception was duly allowed.

Whereupon a judgment was entered for the plaintiff and against the defendant as follows:

This matter coming on on application of the plaintiff for entry of judgment in the above entitled cause, plaintiff appearing by his attorney, James G. Wilson, and the defendant appearing by Paul P. Farrens and A. M. Bull, of its attorneys, and the court having heretofore filed its findings of fact and conclusions of law, and being fully advised in the premises,

IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED that the plaintiff, A. J. Parrington, have and recover of and from the defendant, James C. Davis, Agent United States Railroad Administration, judgment in the sum of Seven Thou-

sand Eight Hundred Six Dollars and Five Cents ($7,806.05), together with interest at the rate of six (6) per cent per annum from the first day of June, A. D. 1919, and the sum of Seven Hundred and Fifty Dollars ($750.00) allowed as attorney's fees in this court, and the plaintiff's further costs and disbursements herein taxed and allowed in the sum of $.....

IT IS FURTHER ORDERED AND ADJUDGED that the defendant pay said sum promptly to the plaintiff as required by Section 206 of the Transportation Act of 1920.

Done and dated in open court this 19th day of July, A. D. 1923.

Upon the date of the making and entry of said judgment, to-wit, on the 19th day of July, 1923, the following stitpulation was entered into between the attorneys of record for plaintiff and defendant and filed with the clerk of the court, to-wit:

IT IS HEREBY STIPULATED AND AGREED by and between the plaintiff and the defendant, acting through their respective attorneys of record, that the defendant may have to and including the 15th day of September, 1923, within which to serve and tender his bill of exceptions.

Thereupon on the 19th day of July, 1923, the court entered an order as follows, to-wit:

Pursuant to the stipulation of the parties hereto, IT IS HEREBY ORDERED AND ADJUDGED

that defendant may have to and including September 15, 1923, within which to serve and tender his bill of exceptions herein.

And now, because the foregoing matters and things are not of record in this case, I, Robert S. Bean, District Judge, and the Judge trying the above entitled action in the District Court of the United States for the District of Oregon, do hereby certify that the foregoing bill of exceptions truly states the proceedings had before me on the trial of the above entitled action, and contains all the evidence, both oral and written, introduced by either of said parties throughout said trial, together with the rulings of the court on the questions of law presented, and that exceptions taken by the defendant therein were duly taken and allowed, and that said bill of exceptions was duly prepared and submitted within the time allowed by the rules of this court as extended by stipulation of the parties and the order of this court duly made and entered in accordance with the provisions of such stipulation, and is now signed and settled as and for the bill of exceptions in the above entitled action, and same is ordered made a part of the record in said action.

R. S. BEAN,
Judge.

It is hereby ordered that the original exhibits referred to in the above bill of exceptions, as being attached thereto, be attached to this bill of exceptions and made a part thereof.

R. S. BEAN,
Judge.

That on the 30th day of October, 1923, there was duly served and filed in said Court the following

PETITION FOR WRIT OF ERROR.

James C. Davis, Director General, as agent United States Railroad Administration (Southern Pacific Company), defendant in the above entitled action, conceiving himself aggrieved by the final order and judgment in this court made and entered against him and in favor of the plaintiff on the 19th day of July, 1923, and the findings of fact and conclusions of law in said cause made, and the objections severally taken thereto, and the rulings of the court thereon, as set forth in his assignments of error filed herein, petitions said court for an order allowing said defendant to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignments of error filed herewith, under and in accordance with the rules of the United States Circuit Court of Appeals in that behalf made and provided:

Also that an order be made fixing the amount of security which the defendant shall give and furnish in said writ of error, and that upon giving such security all further proceedings in this court be stayed until the dismissal of said writ of error by the United States Circuit Court of Appeals, and relative thereto defendant respectfully shows:

That by reason of the premises defendant alleges manifest error as above, to the great damage of the defendant herein.

The defendant has filed herewith his assignments of error upon which he relies and will urge in the said United States Circuit Court of Appeals.

WHEREFORE, defendant prays that a writ of error may issue out of the United States Circuit Court of Appeals for the Ninth Circuit to this court for the correction of the errors so complained of, and that a transcript of the record of proceedings, papers, and all things concerning same, upon which said judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit to the end that said judgment be reversed and that defendant recover judgment as demanded in his answer.

A. M. BULL,
PAUL P. FARRENS,
Attorneys for Defendant.

And on the 30th day of October, 1923, there was duly served and filed the following

ASSIGNMENTS OF ERROR.

Comes now the defendant above named, appearing by A. M. Bull and Paul P. Farrens, his attorneys of record, and says that the judgment and final order of this court, made and entered in the above entitled court on the 19th day of July, 1923, in favor of the plaintiff above named and against the defendant above named, is erroneous and against the just rights of the defendant, and files herein, together with his petition for writ

of error from said judgment and order, the following assignments of error which he avers occurred upon the trial of said cause.

(In view of the fact that in respect of some of the assignments hereinafter set forth, the bill of exceptions does not disclose the express saving of an exception, attention is directed to the ruling of the court relative to the saving of exceptions, as follows:

"MR. FARRENS: If the court please, in those instances where evidence is permitted to go in, either in counsel's case in chief or in my case in chief later on, may it always be understood, where objection has been made, that we have asked for an exception, and that it has been granted?

THE COURT: That may be understood, yes, the case is being tried before the court and I don't wish the testimony stricken out.") (Bill of Exceptions, page —, *supra.*)

I.

The court erred in overruling and in not sustaining defendant's demurrer to plaintiff's amended complaint.

II.

The court erred in sustaining and in not overruling plaintiff's demurrer to defendant's affirmative answer and defense.

III.

The court erred in admitting in evidence, over the objection and exception of defendant, plaintiff's Exhibits 7 and 8, the same being alleged assignments of the claims of Wadhams & Kerr Brothers Company to the plaintiff, the objection thereto being that said alleged assignments were void because contrary to the provisions of Section 3477, Revised Statutes of the United States. (Bill of Exceptions, page —, *supra.*)

IV.

The court erred in refusing, over the objection and exception of the defendant, to permit plaintiff's witness, Frank Kerr, Secretary of Wadhams & Kerr Brothers Company, one of plaintiff's assignors, to answer on cross examination the following question:

"You were not afterwards reimbursed by any one else for any part of these freight charges?" (Bill of Exceptions, page . ., *supra.*)

V.

The court erred in refusing, over the objection and exception of the defendant, to permit plaintiff's witness, Frank Kerr, Secretary of Wadhams & Kerr Brothers Company, one of plaintiff's assignors, on cross examination to answer an interrogatory as to whether or not said Wadhams & Kerr Brothers Company had sold its shipments of sugar involved in this case at a price which would produce the maximum profit allowed by the United States Food Administration, all of which

is more fully illustrated by the following extract taken from the bill of exceptions.

"MR. FARRENS: Now, during the period of federal control of railroads, the United States Food Administration limited the profit that you made on the sale of sugar in this city, didn't they?

A. Yes, sir.

Q. Can you say whether or not your company sold the shipments of sugar which are credited to your company in this complaint for a price which was equal to the maximum profit allowed?

MR. WILSON: I object to that as immaterial.

THE COURT: What has that to do with this case? The right to recover on this freight?

MR. FARRENS: If the court please, I don't know what view your Honor takes of the measure of damages in this case. But in the Intermountain Coal case the United States Supreme Court has indicated, and the Interstate Commerce Commission has always, without exception, ruled that a violation of the fourth section of the Interstate Commerce Commission Act didn't mean that the difference between any two sets of rates was the measure of damages. The plaintiff must prove that he was damaged, that he has personally suffered injury; not a mere technical question of subtracting one rate from the other is the measure of damages. This is not an overcharge case, this is a damage case.

THE COURT: I thought the courts held that the measure of damages is the difference in freight.

MR. WILSON: The Circuit Court of Appeals has, and your Honor held it; this International case referred to is a rebate case.

THE COURT: That is already settled so far as this district is concerned.

MR. FARRENS: Exception saved." (Bill of Exceptions, page —, *supra.*)

VI.

The court erred in admitting in evidence, over the objection and exception of defendant, plaintiff's Exhibit 12, the same being alleged assignment of the claim of Starr Fruit Products Company to the plaintiff, the objection thereto being that said alleged assignment is void because contrary to the provisions of Section 3477 of the Revised Statutes of the United States. (Bill of Exceptions, page —, *supra.*)

VII.

The court erred in admitting in evidence, over the objection and exception of defendant, such portions of plaintiff's exhibit 11 as consisted of freight bills which disclosed on their face that payments were made more than two years prior to the date of the commencement of the action, the nature of said exception being more fully illustrated by the following extract from the bill of exceptions:

"MR. WILSON: I hand you herewith a number of freight receipts, and ask you who paid the freight shown on these receipts?

A. The Starr Fruit Products Company.

MR. WILSON: I offer it in evidence.

MR. FARRENS: I desire at this time to object to the introduction of such of these freight bills in evidence as disclose on their face that payments were made more than two years prior to the date of the complaint filed in this case.

THE COURT: That on the theory barred by the statute?

MR. FARRENS: Yes, under the decision of the United States Supreme Court in the case of K. C. & C. Ry. vs. Wolfe.

THE COURT: Put them in subject to the objection.

MR. FARRENS: Save an exception."

"(The exception was duly allowed and the freight receipts were admitted in evidence and marked plaintiff's Exhibit 11.)"

(Bill of Exceptions, page —, *supra.*)

VIII.

The court erred in refusing, over the objection and exception of the defendant, to allow defendant's motion to strike from the files those portions of plaintiff's Ex-

hibit 6 which reflect freight charges paid more than two years prior to the commencement of the action, which is more fully illustrated by the following extract from the bill of exceptions:

> MR. FARRENS: (Referring to all of plaintiff's exhibits respecting freight charges paid more than two years prior to the commencement of action.) In order to make a record I would like to make the same motion based on the statute of limitations as made with respect to the exhibits offered by the witness, Mr. Kerr, of Wadhams & Kerr, namely, that those exhibits be stricken from the files in this case.
>
> THE COURT: You will be entitled to urge that on the final argument as to all items that are barred by the statute."

(Bill of Exceptions, page —, *supra.*)

IX.

The court erred in admitting in evidence, over the objection and exception of the defendant, plaintiff's Exhibit 13, the same being a freight bill showing that Lang & Company, one of the plaintiff's assignors, has paid the freight charges shown on said bill more than two years prior to the commencement of this action, the objection thereto being that recovery thereon was barred by the statute of limitations. (Bill of Exceptions, page —, *supra.*)

X.

The court erred in admitting in evidence, over the objection and exception of the defendant, plaintiff's Exhibit 14, the same being alleged assignment of the claim of Lang & Company to the plaintiff, the objection thereto being that said alleged claim is void because contrary to the provisions of Section 3477, Revised Statutes of the United States. (Bill of Exceptions, page —, *supra.*)

XI.

The court erred in admitting in evidence, over the objection and exception of defendant, plaintiff's Exhibit 15, said objection running to such of the freight bills included within said Exhibit, which showed on their face that freight charges had been paid more than two years prior to the commencement of the action, and that said claims were therefore barred by the statute of limitations. (Bill of Exceptions, page —, *supra.*)

XII.

The court erred in admitting in evidence, over the objection and exception of defendant, plaintiff's Exhibit 16, the same being alleged assignment of the claim of Mason, Ehrman & Company to the plaintiff, the objecton thereto being that said alleged assignment is void because contrary to the provisions of Section 3477 of the Revised Statutes of the United States. (Bill of Exceptions, page —, *supra.*)

XIII.

The court erred in admitting in evidence, over the objection and exception of the defendant, plaintiff's Exhibit 17, said objection running to one of the freight bills included in said exhibit which showed on its face that the freight charges therein referred to had been paid more than two years prior to the commencement of this action, and that the claim thereon was barred by the statute of limitations. (Bill of Exceptions, page —, *supra.*)

XIV.

The court erred in admitting in evidence, over the objection and exception of defendant, plaintiff's Exhibit 18, the same being alleged assignment of the claim of Tru-Blu Biscuit Company to the plaintiff, the objection thereto being that said alleged assignment is void because contrary to the provisions of Section 3477, Revised Statutes of the United States. (Bill of Exceptions, page —, *supra.*)

XV.

The court erred in admitting in evidence, over the objection and exception of defendant, one of the freight bills included in plaintiff's Exhibit 19, which showed on its face that the charges therein referred to had been paid more than two years prior to the commencement of this action, and that the claim thereon was barred by the statute of limitations. (Bill of Exceptions, page —, *supra.*)

XVI.

The court erred in admitting in evidence, over the objection and exception of defendant, plaintiff's Exhibit 20, the same being alleged assignment of the claim of Wadhams & Company to the plaintiff, the objection thereto being that said alleged assignment is void because contrary to the provisions of Section 3477 of the Revised Statutes of the United States. (Bill of Exceptions, page —, *supra.*)

XVII.

The court erred in admitting in evidence, over the objection and exception of the defendant, plaintiff's Exhibit 23, consisting of two freight bills paid by Meier & Frank Company, one of plaintiff's assignors, more than two years prior to the commencement of this action, the objection thereto being that the claims thereon were barred by the statute of limitations. (Bill of Exceptions, page —, *supra.*)

XVIII.

The court erred in refusing, over the objection and exception of the defendant, to allow defendant's motion to strike from the record certain testimony given by the plaintiff at variance with his complaint, the character of the ruling and exception being more fully illustrated by the following extract from the bill of exceptions.

> "Tariff No. 6 and the reissues thereof provide a switching rate from Portland or East Portland

to St. Johns. The switching rate on sugar from Portland and East Portland to St. Johns, under Tariff 6-C, was thirty-seven and one-half cents per ton of 2000 pounds, minimum carload 20 tons. The same item, 60-G, in this switch tariff, carries a rate between St. Johns and Portland of $7.50 per car, and between St. Johns and East Portland of $5.00 per car, subject, however, to a provision as follows: 'Applies only on freight interchanged with water carriers at St. Johns, Oregon, and when delivered to or received from railroad connection of O.-W. R. & N. at East Portland or at Portland, Oregon, in line haul movement.' The witness then gave testimony tending to prove that if the ruling last above quoted prevented the switching rate of $7.50 and $5 per car from being applicable between Portland and East Portland and St. Johns, the switch tariff nevertheless carries a thirty-seven and one-half cent per ton rate, which was not so limited, and thereupon the following proceedings were had:

MR. FARRENS: Objected to because counsel is now trying to prove a different measure of damages or different rate than alleged in the complaint.

MR. WILSON: No, I am not. I would like your Honor to take a look at this tariff.

MR. FARRENS: My objection has nothing to do with the truth or falsity of the statement as

just made, but I call your attention to the fact that the 6th paragraph of the complaint alleges a measure of damages and makes a statement as to the rates in existence from December 31, 1919, to the end of the federal control, says that by Supplement No. 27 of the O.-W. R. & N. Co. Local Freight Tariff No. 6-C, I. C. C. 312, Item 60-G, a certain rate was in effect; a rate of $7.50 per car; and further on in his complaint he alleges that this is the measure of his damages, the difference between what was paid and that proportional rate plus $7.50 per car. Now, I contend that he is trying to introduce evidence to support an allegation which is in variance with his complaint, and which would tend to support a different measure of damages than that which he has alleged.

MR. WILSON: If there is any doubt in your Honor's mind, the evidence having been introduced without objection, I would like leave to amend the complaint to conform with the proof.

MR. FARRENS: As far as the introduction of the evidence without objection, the type of counsel's question was such as to give me no warning what he was intending to elicit from the witness. Had I known, I would have objected and I move now to strike from the record.

THE COURT: Let the record remain.

MR. WILSON: As a matter of fact, I don't concede. I am saying that according to his inter-

pretation of that paragraph; I don't give it the same interpretation he does. I say it does apply. He is wanting, your Honor, to make it apply in only one instance, and I say the case is susceptible of application in two instances, to wit, both when the shipment is received from water carrier and also when it is in connection with line haul of connecting carrier, because otherwise they wouldn't put in the clause 'when' after the word 'and' if it were to be in one instance only. Now, it says when received from ship and when it is in connection with line haul. But I say if there is any doubt in your Honor's mind that the 37½ cents per ton still applies instead of the $7.50 per car applying prior to the issuance of this tariff.

MR. FARRENS: If the court please, in those instances where evidence is permitted to go in, either in counsel's case in chief or in my case in chief later on, may it be always understood where objection has been made, that we have asked for an exception, and that it has been granted.

THE COURT: That may be understood, yes. The case is being tried before the court and I don't wish the testimony stricken out." (Bill of Exceptions, page ..., supra.)

XIX.

The court erred in permitting counsel for plaintiff to testify, over the objection and exception of the de-

fendant, that $1200.00 was a reasonable attorney's fee to be allowed the plaintiff in this case, said objection being that attorney's fees were not allowable against the Director General of Railroads nor the United States government. (Bill of Exceptions, page ..., supra.)

XX.

The court erred in permitting cross examination of the witness J. N. Harney relative to the receipt of a carload shipment of sugar at St. Johns on August 10, 1921, and the collection thereon of freight charges on the basis of the proportional rate to Portland plus the switching charge to St. Johns, all of which testimony was received over the objection and exception of defendant, to the effect that said testimony was irrelevant because the shipment referred to was made and switching charges thereon collected subsequent to the termination of federal control of railroads. (Bill of Exceptions, page ..., supra.)

XXI.

The court erred in admitting in evidence, over the objection and exception of the defendant, proof of the execution of an alleged assignment of the claim of Meier & Frank Company to the plaintiff, the objection thereto being that said alleged assignment was void because contrary to the provisions of Section 3477 of the Revised Statutes of the United States. (Bill of Exceptions, page ..., supra.)

XXII.

The court erred in overruling defendant's objection to finding of fact I and in not sustaining said objection for the reasons therein stated.

XXIII.

The court erred in overruling defendant's objection to finding of fact II and in not sustaining said objection for the reasons therein stated.

XXIV.

The court erred in overruling defendant's objection to finding of fact III and in not sustaining said objection for the reasons therein stated.

XXV.

The court erred in overruling defendant's objection to finding of fact IV and in not sustaining said objection for the reasons therein stated.

XXVI.

The court erred in overruling defendant's objection to finding of fact V and in not sustaining said objection for the reasons therein stated.

XXVII.

The court erred in overruling defendant's objection to finding of fact VI and in not sustaining said objection for the reasons therein stated.

XXVIII.

The court erred in overruling defendant's objection to finding of fact VII and in not sustaining said objection for the reasons therein stated.

XXIX.

The court erred in overruling defendant's objection to finding of fact VIII and in not sustaining said objection for the reasons therein stated.

XXX.

The court erred in overruling defendant's objection to finding of fact IX and in not sustaining said objection for the reasons therein stated.

XXXI.

The court erred in overruling defendant's objection to finding of fact X and in not sustaining said objection for the reasons therein stated.

XXXII.

The court erred in overruling defendant's objection to the effect that the findings of fact, while purporting to be specific in nature, nevertheless fail to cover many of the issues upon the pleadings and the evidence in the case.

XXXIII.

The court erred in overruling defendant's objection to conclusion of law I and in failing to conclude that

the charges collected from plaintiff's alleged assignors were legal and not in violation of the amended fourth section of the Act to Regulate Commerce, and that the said rates as collected were the only lawfully published and effective rates applicable to the shipments involved.

XXXIV.

The court erred in overruling defendant's objection to conclusion of law II and in failing to conclude that the defendant is not liable to plaintiff in any sum of money whatsoever.

XXXV.

The court erred in overruling defendant's objection to conclusion of law IV and in failing to conclude that the defendant is entitled to a judgment against the plaintiff for costs and disbursements.

XXXVI.

The court erred in overruling defendant's general objection to a judgment in favor of plaintiff and in refusing defendant's request for a judgment in favor of the defendant, for the reason that the testimony properly supported a judgment in favor of the defendant.

XXXVII.

The court erred in overruling defendant's motion for special findings of fact and conclusions of law, and that the refusal as to each and every such special finding of fact and conclusion of law was separate error

committed by the court over the objection and exception of the defendant.

XXXVIII.

The court erred in entering judgment in favor of the plaintiff and against the defendant because the findings of fact and conclusions of law which the court filed as its decision in this case did not support such a judgment.

XXXIX.

WHEREFORE, the said defendant and plaintiff in error prays that the judgment of the District Court of the United States, for the District of Oregon, be reversed, with directions to the District Court to enter a judgment in favor of the defendant.

A. M. BULL,
PAUL P. FARRENS,
Attorneys for Defendant.

That on said 30th day of October, 1923, there was duly served and filed in said Court and approved by the Judge of said Court the following

BOND ON WRIT OF ERROR.

KNOW ALL MEN BY THESE PRESENTS, that JAMES C. DAVIS, Director General, as agent United States Railroad Administration, principal, and UNITED STATES FIDELITY & GUARANTY COMPANY a Maryland corporation, as surety, are held and firmly bound unto A. J. Parrington, plaintiff

herein, in the sum of $10,000.00, to which payment well and truly to be made we bind ourselves, our successors and assigns, jointly and severally, by these presents.

SEALED with our seals and dated the 30th day of October, 1923.

WHEREAS, the above named James C. Davis, Director General, as agent United States Railroad Administration, has prosecuted a writ of error to the United States Circuit Court of Appeals, for the Ninth Circuit, to reverse the judgment in the above entitled cause of the District Court of the United States for the District of Oregon, entered on the 19th day of July, 1923;

NOW, the conditions of this obligation are such that if the above named James C. Davis, Director General, as agent United States Railroad Administration, defendant, shall prosecute said writ of error to effect and answer all costs and damages if he shall fail to make good this plea, then this obligation to be void, otherwise to be and remain in full force and effect.

JAMES C. DAVIS,
Director General, as Agent United States Railroad Administration.

By PAUL P. FARRENS,
One of His Attorneys.

UNITED STATES FIDELTY & GUARANTY COMPANY,

By DOUGLAS R. TATE,
Its Attorney in Fact.

Examined and approved this 30th day of October, 1923.

R. S. BEAN, District Judge.

And on said 30th day of October, 1923, there was duly made and entered the following

ORDER ALLOWING WRIT OF ERROR.

Now on this 30th day of October, 1923, came the defendant above named, James C. Davis, Director General, as agent United States Railroad Administration (Southern Pacific Company), appearing by Paul P. Farrens, one of his attorneys of record herein, and filed herein and presented to the court his petition praying for an allowance of a writ of error from the decision and judgment of this court made and entered on the 19th day of July, 1923, in favor of the plaintiff above named against said defendant, and the findings of fact and conclusions of law made or refused on the trial of the above entitled cause, out of the United States Circuit Court of Appeals in and for the Ninth Circuit to this court, together with certain assignments of error intended to be urged by him within due time.

And also praying that a transcript of the record and proceedings and papers upon which said judgment herein was entered, duly authenticated, may be sent to the said Circuit Court of Appeals for the Ninth Circuit, and also praying that an order be made fixing the amount of security which the defendant shall give and

furnish upon said writ of error, and that upon the giving of said security all further proceedings in this court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

NOW, THEREFORE, in consideration thereof this court does allow said writ of error upon said defendant filing with the clerk of this court a good and sufficient bond in the sum of $10,000.00, to the effect that said defendant, James C. Davis, Director General, as agent United States Railroad Administration (Southern Pacific Company), shall prosecute the said writ of error to effect and answer all damages and costs if defendant fails to make his plea good then said bond to be void, otherwise to remain in full force and virtue, the said bond to be approved by the court, and it is ordered that all proceedings in this court be and the same are hereby suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit, and that said bonds shall operate as a supersedeas bond.

Dated this 30th day of October, 1923.

R. S. BEAN, Judge.

And on the said 30th day of October, 1923, there was filed the following

STIPULATION FOR ORDER DIRECTING TRANSMISSION OF ORIGINAL EXHIBITS.

IT IS STIPULATED AND AGREED by and between counsel for the respective parties that copies of the original exhibits physically attached to the bill of exceptions may be omitted from the certified copy of the record, and that the clerk of this court may except such exhibits from the effect of his certificate.

IT IS FURTHER STIPULATED that said original exhibits physically attached to the bill of exceptions shall be ordered to be transmitted with the certified transcript of the record to the United States Circuit Court of Appeals for the Ninth Circuit, and that thereafter either party may cause any other and additional original exhibits to be transmitted by the clerk of the District Court of the United States, for the District of Oregon, to the United States Circuit Court of Appeals, for the Ninth Circuit.

PAUL P. FARRENS,

Of Attorneys for Defendant and Plaintiff in Error.

JAMES G. WILSON,

Of Attorneys for Plaintiff and Defendant in Error.

Dated October 30th, 1923.

And on said 30th day of October, 1923, there was made and entered the following

ORDER.

Pursuant to the stipulation of the parties hereto, it is hereby ORDERED AND ADJUDGED that the

clerk of this court shall transmit with a certified copy of the record in this cause the original exhibits which are physically attached to the bill of exceptions, and that thereafter either party may cause such other and additional original exhibits as he may desire to be forwarded by the clerk of this court to the United States Circuit Court of Appeals.

R. S. BEAN, Judge.

On said 30th day of October, 1923, there was filed the following

STIPULATION RE CERTIFICATION BY CLERK.

Attorneys for plaintiff in error herein having prepared and compared with the original record the within printed transcript,

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED by and between the parties to the within proceedings for a writ of error, by and through their respective attorneys, that the within printed record tendered to the Clerk of the United States District Court, for the District of Oregon, for his certificate, is a true transcript of the record in the within cause, and that the clerk of the said court shall certify the said transcript without comparison thereof with the original record.

PAUL P. FARRENS,
Of Attorneys for Plaintiff in Error.
JAMES G. WILSON,
Of Attorneys for Defendant in Error.

That on the 31st day of October, 1923, there was filed the following

STIPULATION.

IT IS HEREBY STIPULATED AND AGREED between the parties hereto, by their respective attorneys of record, that in printing the transcript of record on writ of error in said cause the caption, title and clerk's endorsements of filing of papers and other formal matters may be omitted and that said transcript of record in said cause shall consist of the following:

1. Amended complaint (with statement of the date of filing of original complaint).

2. Amended stipulation amending complaint.

3. Demurrer to amended complaint.

4. Minutes of Court, January 23, 1923. Memorandum opinion.

5. Minutes of Court, January 22, 1923. Order overruling demurrer.

6. Answer to amended complaint.

7. Demurrer to answer.

8. Minutes of Court, February 5, 1923. Order sustaining demurrer.

9. Minutes of Court, February 5, 1923. Memorandum opinion.

10. Notice for re-argument of demurrer to answer.

11. Findings of fact and conclusions of law.

12. Judgment order.

13. Order extending time to serve and tender defendant's bill of exceptions.

14. Bill of exceptions.

15. Petition for writ or error.

16. Assignments of error.

17. Order allowing writ of error and fixing amount of bond.

18. Bond on writ of error.

19. Writ of error.

20. Citation.

21. Stipulation in re certification by clerk.

22. Stipulation for order directing transmission of original exhibits.

23. Order directing transmission of original exhibits.

24. This stipulation.

25. Clerk's certificate.

IT IS FURTHER STIPULATED AND AGREED that in printing the transcript of record on writ of error in said cause all of the exhibits attached to the amended complaint, the stipulation amending the complaint and the amended stipulation amending the

complaint shall be omitted, except that as to each of such exhibits the data shown in the two right-hand columns thereof under the headings "Date paid" and "Overcharge" shall be printed.

PAUL P. FARRENS,

Of Attorneys for Defendant and Plaintiff in Error.

JAMES G. WILSON,

Of Attorneys for Plaintiff and Defendant in Error.

L-8845

CERTIFICATE OF THE CLERK OF THE U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Oregon—ss.

The attorneys for the respective parties to the within proceedings having stipulated that the within printed transcript of record, as prepared, compared and tendered to me for certification by the attorneys for the plaintiff in error, is a true transcript of the record in this cause, and that I shall certify the same without comparison.

NOW, THEREFORE, in accordance with said stipulation, and without comparison I, G. H. Marsh, Clerk of the United States District Court, for the District of Oregon, do hereby certify that the foregoing transcript of record upon writ of error in the case in which James C. Davis, Director

General, as agent United States Railroad Administration (Southern Pacific Company) is defendant and plaintiff in error, and A. J. Parrington is plaintiff and defendant in error, is a full, true and correct transcript of the record and proceedings had in said court in said cause, as the same appear of record and on file at my office and in my custody, ~~the same having been compared by attorneys for plaintiff in error.~~

And I further certify that the fee for certificate to the within transcript, to wit, the sum of ~~fifty cents,~~ sixty five has been paid by the said plaintiff in error.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said court at Portland in said district this 24th day of November 1923.

Lyd. G. H. Marsh.....
Clerk.